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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN THE MATTER OF A DEPOSITION
SUBPOENA SERVED IN:

F.B.T. PRODUCTIONS, LLC AND EM2M,
LLC,

Plaintiffs,

v.

AFTERMATH RECORDS, INTERSCOPE
RECORDS, UMG RECORDING, INC., and
ARY, INC.,

Defendants.

Case No. 08-80040 Misc. RMW (PVT)

[Related to Case No. CV 07-3314 PSG
(MANx) (C.D. Cal.)]

**NON-PARTY STEVE JOBS'S
OBJECTION TO ORDER DENYING
MR. JOBS'S MOTION FOR
PROTECTIVE ORDER TO QUASH
"APEX" DEPOSITION SUBPOENA**

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1 **I. INTRODUCTION**

2 Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Civil L.R. 72-2, non-
3 party Steve Jobs, the CEO of Apple, Inc. (“Apple”), respectfully objects to Magistrate Judge
4 Patricia V. Trumbull’s May 1, 2008 Order Denying Non-Party’s Steve Jobs’ Motion to Quash
5 Subpoena (the “Order”).¹

6 The Order is clearly erroneous and contrary to the well-settled law governing apex
7 depositions and discovery from non-parties. The underlying litigation, pending in the Central
8 District of California, focuses solely on the interpretation of certain terms in a contract between
9 music artist Eminem and his record company, Universal Music Group. Neither Mr. Jobs nor
10 Apple is a party to the litigation or to the underlying contract, and Mr. Jobs does not have any
11 knowledge relevant to the dispute. Plaintiffs, moreover, have not shown that any information
12 pertaining to Apple’s distribution of Eminem’s music on iTunes is not available through other
13 means or from more knowledgeable witnesses. Therefore, the Order must be set aside.

14 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

15 On May 21, 2007, Plaintiffs F.B.T. Productions, LLC and Em2M, LLC (collectively,
16 “Plaintiffs”) commenced an action (“Action”) against Defendants Aftermath Records, Interscope
17 Records, UMG Recordings, Inc., and Ary, Inc. (collectively, “Defendants”). On June 13, 2007,
18 Plaintiffs filed a First Amended Complaint (“Complaint”) asserting claims for breach of contract
19 and declaratory judgment. (Vandell Decl. ¶ 3, Ex. A (Complaint).) The Complaint alleges that
20 Defendants have breached certain agreements (the “UMG Agreements”) relating to the payment
21 of royalties for recordings of performances by Eminem (the “Eminem Masters”). (Vandell Decl.
22 ¶ 4.) According to the Complaint, the UMG Agreements require Defendants to pay royalties at a
23 rate of 50 percent “[o]n masters licensed by us or our licensees to others for their manufacture and
24 sale of records or for any other use.” (Vandell Decl. ¶ 3, Ex. A (Complaint ¶ 29).) Plaintiffs
25 allege that this provision of the UMG Agreements governs the payment of royalties for the sale of
26 digital downloads of Eminem’s recordings. (Vandell Decl. Ex. A (Complaint ¶ 35.) Instead,

27
28 ¹ A copy of the Order is attached to the declaration of Colin Vandell as Exhibit I.

1 Defendants have allegedly calculated the royalties under the “distribution” provisions of the
2 UMG Agreements at a 12 percent royalty rate. (Vandell Decl. ¶ 5, Ex. A (Complaint ¶ 35);
3 Plaintiffs’ Opposition to Motion for Protective Order at 1-2.)

4 Mr. Jobs and Apple are not parties to the Action or to the UMG Agreements. Mr. Jobs
5 and Apple were not involved in negotiating, drafting, or executing the UMG Agreements, and
6 Apple has no agreements with Plaintiffs specific to the Eminem Masters. (Saul Decl. ¶¶ 3-5; Cue
7 Decl. ¶¶ 3-4.) Apple’s relationship with Defendants is limited to a series of distribution
8 agreements entitled “Digital Music Download Sales Agreements” (the “Download Agreements”).
9 (Saul Decl. ¶ 5; Cue Decl. ¶ 5.) The Download Agreements provide the terms under which Apple
10 may make electronic digital copies of sound recordings, owned or controlled by the Defendants,
11 available for preview and purchase through Apple’s iTunes Store. (Saul Decl. ¶ 5; Cue Decl.
12 ¶ 5.)

13 On January 11, 2008, Plaintiffs served a document subpoena on Apple consisting of
14 numerous over broad and vague requests (the “Apple Document Subpoena”). (Vandell Decl. ¶ 6,
15 Ex. B (Apple Document Subpoena).) The subpoena covered matter far beyond the scope of the
16 Action including, *inter alia*, any and all agreements between Apple and UMG Recordings, Inc.
17 regarding the distribution of music, and all communications and other documents relating in any
18 way to such agreements. (Vandell Decl. ¶ 8, Ex. B (Apple Document Subpoena).) Apple
19 engaged in meet and confer discussions with Plaintiffs in an effort to negotiate, in good faith, a
20 proper scope of production. (Vandell Decl. ¶ 9.) Apple offered to provide a number of
21 documents, including any agreements between Apple and any of Defendants (and any
22 amendments) that pertain to distribution of the Eminem Masters. (Vandell Decl. ¶ 10.)

23 Plaintiffs refused Apple’s offer and instead served a deposition subpoena on Steve Jobs,
24 Apple’s CEO (the “Jobs Deposition Subpoena”). (Vandell Decl. ¶ 12, Ex. F (Jobs Deposition
25 Subpoena).) Plaintiffs also filed a motion to compel further responses to the Apple Document
26 Subpoena in the Central District of California. (Vandell Decl. ¶ 11.)

27 During the meet and confer discussions required under Civil L.R. 37-1 that preceded
28 Mr. Jobs’s Motion for Protective Order, Plaintiffs’ sole explanation for the relevance of Mr.

1 Jobs's deposition was the fact that he authored an essay entitled *Thoughts on Music*. (Vandell
2 Decl. ¶ 13.) In this essay, Mr. Jobs discusses his views on why Apple uses a digital rights
3 management system to protect content offered through the iTunes Store. (See Vandell Decl. ¶ 14,
4 Ex. H (*Thoughts on Music*)). The music available through iTunes is subject to various
5 agreements with content owners that require Apple to protect the content from unauthorized
6 distribution. To emphasize this point, Mr. Jobs observed that because Apple does not own the
7 music, "it must license the rights to distribute music from others." (See Vandell Decl. ¶ 14, Ex. H
8 (*Thoughts on Music*)). In the essay, Mr. Jobs does not define or use the term "license" in any
9 technical or legal sense, and he does not offer any opinion on the scope of the rights of on-line
10 distributors to sell music content. (See Vandell Decl. ¶ 15, Ex. H (*Thoughts on Music*)). Mr. Jobs
11 simply uses common terminology to underscore the fact that Apple does not own the music
12 available through its iTunes store but must acquire the rights to distribute that content from
13 others. (See Vandell Decl. ¶ 15, Ex. H (*Thoughts on Music*)).

14 During the meet and confer discussions, Plaintiffs did not – and could not – show that
15 *Thoughts on Music* had any relevance to the Action. Given Mr. Jobs's numerous responsibilities
16 as the CEO of Apple and the fact that he does not possess any unique knowledge relevant to the
17 Action, Mr. Jobs moved to quash the deposition subpoena on March 24, 2008.

18 During the hearing, Plaintiffs asserted that the deposition of Mr. Jobs was warranted
19 because he executed the original Download Agreement. Plaintiffs, however, never made this
20 argument during the meet and confer discussions that preceded the hearing. (Vandell Decl. ¶ 16.)

21 The Order denied the motion for protective order and granted Plaintiffs a two-hour
22 deposition of Mr. Jobs. The Order states that the "nature of the [Download Agreements are]
23 relevant to the present litigation, because the contract at issue in this litigation provides for
24 different royalty rates depending on whether the recordings covered by the contract are sold or
25 licensed." (Vandell Decl. Ex. I (Order at 2)). Citing the fact that Mr. Jobs authored the essay and
26 signed one of the Download Agreements, the Order concludes that "a party's subjective
27 understanding may be relevant to the interpretation of a contract." (Vandell Decl. Ex. I (Order at
28 2-3)). Mr. Jobs timely filed an objection to the Order.

1 **III. ARGUMENT**

2 The Order should be set aside because it is a complete departure from well-established
3 precedent governing apex depositions and the law governing third-party discovery under Rule 26
4 of the Federal Rules of Civil Procedure.

5 **A. The Order Is Contrary to the Law Limiting Apex Depositions.**

6 Federal courts routinely protect non-parties, particularly high-level, apex corporate
7 officials, from harassing, inconvenient, and repetitive depositions and discovery. *See, e.g., Dart*
8 *Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980); *Thomas v. IBM*, 48 F.3d
9 478, 483 (10th Cir. 1995). The doctrine requires that a party seeking to depose an apex employee
10 must first establish that the deposition is necessary by showing that: (1) the high-level official
11 possesses unique personal knowledge of relevant facts at issue; and (2) the party seeking the
12 deposition has already exhausted less intrusive discovery methods. *See Celerity, Inc. v. Ultra*
13 *Clean Holding, Inc.*, No. C 05-4374 MMC (JL), 2007 WL 205067, at *4 (N.D. Cal. Jan. 25,
14 2007); *Webside Story v. Netratings Inc.*, No. 06cv408 WQH (AJB), 2007 WL 1120567, at *2
15 (S.D. Cal. Apr. 6, 2007). The Order is contrary to the law and clearly erroneous because it
16 permits the deposition of a non-party, apex witness without any showing that the witness has
17 unique knowledge of relevant facts or that Plaintiffs have exhausted other sources.

18 **1. Steve Jobs Does Not Possess Unique Personal Knowledge of Any** 19 **Relevant Fact.**

20 The Order is contrary to law because it permits the deposition to proceed even though
21 Plaintiffs failed to establish that Mr. Jobs has unique personal knowledge of a relevant fact at
22 issue. Unique personal knowledge “is an essential component of the standard for an apex
23 deposition - [meaning] unique personal knowledge by the high corporate official, unavailable
24 from less intrusive discovery, including interrogatories and the depositions of lower-level
25 employees.” *See Celerity*, 2007 WL 205067, at *8.

26 The Order states: “[I]t appears that [Steve Jobs] may have first-hand knowledge of a
27 relevant fact.” Mr. Jobs executed a Download Agreement and, according to the Order, there is
28 “at least some reason to believe that Jobs understood the nature” of the Download Agreements

1 based on the *Thoughts on Music* essay. (Vandell Decl. Ex. I (Order at 2-3).) The Order's
2 findings are clearly erroneous for at least two reasons. First, Mr. Jobs does not have unique
3 personal knowledge of the Download Agreements or the provisions relating to the grant of
4 authority to Apple to offer digital downloads of sound recordings. (Saul Decl. ¶¶ 6, 8; Cue Decl.
5 ¶ 6.) Second, even if Mr. Jobs had some unique understanding of those provisions – which he
6 does not – his understanding is irrelevant.

7 **a. Mr. Jobs's Execution of One Download Agreement Does Not**
8 **Support a Finding That He Has Relevant Personal Knowledge,**
9 **Much Less Unique Knowledge.**

10 Mr. Jobs does not have unique personal knowledge of the Download Agreements. While
11 Mr. Jobs executed one of the several contracts that make up the Download Agreements, he was
12 not involved in negotiating the provisions relating to the scope of Apple's authority to offer
13 Defendants' content on iTunes. (Saul Decl. ¶ 8; Cue Decl. ¶ 7.) In fact, Mr. Jobs was not a
14 member of the negotiating team and he did not attend the negotiation sessions. (Saul Decl. ¶ 6.)
15 Apple's negotiating team consisted of Kevin Saul, Eddy Cue, Bud Tribble, James Higa, and Jeff
16 Robbin. (Saul Decl. ¶ 6; Cue Decl. ¶ 6.) The negotiations covered all the details that appeared in
17 the final Download Agreements, including the terms governing the scope of authority granted to
18 Apple for the distribution of content owned by UMG. (Saul Decl. ¶ 8.) The structure of the
19 Download Agreements as well as their definitions, terms, and technical requirements were the
20 sole responsibility of the negotiating team. (Saul Decl. ¶ 8.) Mr. Jobs's involvement was limited
21 to providing direction in determining high-level business points such as price. (Saul Decl. ¶ 8.)
22 Mr. Jobs was not involved in drafting or negotiating the provisions contained in the Download
23 Agreements that bear on Apple's authority to offer for sale digital downloads. Thus, Mr. Jobs
24 does not have unique personal knowledge of the nature or scope of Apple's rights regarding
25 digital downloads.

26 Mr. Cue, Mr. Saul and the other members of the negotiation team are far more familiar
27 with the "nature" of the Download Agreements and have substantially more information
28

concerning the nature of the relationships between Apple and the Defendants.² (Saul Decl. ¶¶ 6-8; Cue Decl. ¶ 6.) As Mr. Jobs's counsel suggested at the hearing – and as Plaintiffs have done in other related litigation – Plaintiffs should be required to exhaust these alternative sources of relevant evidence before they seek Mr. Jobs's deposition. (Cue Decl. ¶¶ 10-13.) *See* Fed. R. Civ. P. 26; *Mulvey v. Chrysler*, 106 F.R.D. 364, 366 (D.R.I. 1985). Apple has offered a 30(b)(6) deposition on the Download Agreements as well as the depositions of Mr. Cue and Mr. Saul. Therefore, the law plainly precludes Mr. Jobs's deposition at this time, and the Order must be set aside.

b. *Thoughts on Music* Does Not Support a Finding That Mr. Jobs Has Relevant Personal Knowledge, Much Less Unique Knowledge.

Nothing in *Thoughts on Music* supports the Order's conclusion that Mr. Jobs may have relevant personal knowledge based on the contents of the essay. (Vandell Decl. Ex. I (Order at 2-3).) In *Thoughts on Music*, Mr. Jobs offers his personal views on the use of digital rights management systems to protect content available through the iTunes Store. (Vandell Decl. Ex. H (*Thoughts on Music*).) Mr. Jobs wrote: "Since Apple does not own or control any music itself, it must license the rights to distribute music from others, primarily the 'big four' music companies." (Vandell Decl. ¶ 14, Ex. H (*Thoughts on Music*).) This observation simply underscores that Apple does not own the music but must acquire the rights to distribute the content from the owners.

This is a far cry from the question at issue in the Action. The dispute in the Action is over whether Plaintiffs should be paid under the UMG Agreements for music sold and downloaded from the Internet under a royalty rate based on the distribution of "records" or under a royalty rate based on the licensing of *master* recordings. (Vandell Decl. Ex. A (Complaint ¶¶ 29 & 35); Plaintiffs' Opposition to Motion for Protective Order at 1-2.) The UMG Agreements provide that

² In fact, Mr. Cue was deposed by Plaintiffs' counsel in lieu of deposing Mr. Jobs in a similar litigation pending in New York. Mr. Cue was questioned on both the substance of the Download Agreements and on the meaning of the *Thoughts on Music* essay, which he reviewed and provided comments on prior to its publication. (*See* Cue Decl. ¶¶ 10-13.) After Mr. Cue's deposition, Plaintiffs' counsel did not seek to depose Mr. Jobs.

1 Plaintiffs are entitled to a special 50 percent royalty (instead of the 12 percent royalty they receive
 2 for sales of non-LP records) for “*masters* licensed by us or our Licensees to others *for their*
 3 *manufacture and sale of records or for any other use.*” (Vandell Decl. Ex. A (Complaint ¶ 29).)
 4 Any third party selling Eminem’s music must have authority from UMG because UMG controls
 5 the rights to “manufacture, distribute, sell, and license for sale and distribution those master
 6 recordings in various configurations throughout the universe.” (Vandell Decl. Ex. A (Complaint
 7 ¶ 26).) But Mr. Jobs’s essay does not demonstrate that he has any knowledge relevant to the
 8 Action because the essay does not consider the very distinction upon which the parties are
 9 litigating. *Thoughts on Music* does not address, either explicitly or implicitly, whether Apple
 10 licensed a *master* recording for “*manufacture and sale of records or for any other use*” from
 11 Defendants within the meaning of the UMG Agreements.

12 The Order’s finding that the essay provides “at least some reason to believe that Jobs
 13 understood the nature of the iTunes Agreement to be a license rather than a sale” (Vandell Decl.
 14 Ex. I (Order at 2)) fails to appreciate that the issue is not one of sale versus license but whether
 15 Apple has been granted a license to a master recording for the uses specified in the UMG
 16 Agreement. Mr. Jobs’s essay does not begin to address this distinction and thus does not suggest
 17 that Mr. Jobs has unique personal information relevant to the Action.

18 **c. Mr. Jobs’s Subjective Understanding of the Download**
 19 **Agreements Is Irrelevant.**

20 Even if Mr. Jobs had some unique opinion regarding the nature of the authority granted to
 21 Apple in the Download Agreements – which he does not – that opinion would be irrelevant to the
 22 underlying dispute. When a third-party contract arguably bears some relevance to litigation,
 23 courts have uniformly held that a non-party’s *opinion* about the contract is inadmissible and
 24 irrelevant as a matter of law. *See, e.g., Morrow v. L.A. Unified Sch. Dist.*, 149 Cal. App. 4th
 25 1424, 1444-45 (2007); *Medmarc Cas. Ins. Co. v. Arrow Int’l, Inc.*, No. CIV A 01 CV 2394, 2002
 26 WL 1870452, at *6 (E.D. Pa. July 29, 2002) (denying discovery of agreements between defendant
 27 and third party on ground that they were irrelevant to interpretation of contract between plaintiff
 28 and defendant) (citation omitted). While the Download Agreements may be relevant to determine

1 whether the Defendants granted Apple rights to “masters licensed by [Defendants] for their
2 manufacture and sale of records or for any other use,” as specified in the UMG Agreements, this
3 turns on the legal interpretation of the UMG Agreement and the rights granted in the Download
4 Agreements, not on Mr. Jobs’s subjective opinion.

5 The Order states that “there are situations in which a contracting party’s subjective
6 understanding may be relevant to the interpretation of a contract,” and suggests that *Thoughts on*
7 *Music* may evidence Mr. Jobs’s understanding of the nature of the UMG Agreements. (Order at
8 2-3 (citing Cal. Civ. Code § 1649).) This determination is wrong as a matter of law and
9 constitutes clear error. *See Houghton v. Kerr Glass Mfg. Corp.*, 261 Cal. App. 2d 530, 536-37
10 (1968) (holding that trial court’s admission of evidence of party’s subjective understanding of
11 contract constituted reversible error). A party’s uncommunicated subjective understanding of a
12 contract is not relevant. *Houghton*, 261 Cal. App. 2d at 537 (“It has long been a settled principle
13 of contract law that the intention of a party to a bilateral agreement which is undisclosed and
14 uncommunicated to the other party is, in the absence of mistake or fraud, immaterial under the
15 objective theory of contract.”) (collecting cases); *see also Orton v. Embassy Realty Assocs.*, 91
16 Cal. App. 2d 434, 441 (1949) (“When words of a doubtful meaning are used in a writing, parol
17 testimony is admissible to show the common meaning of the words used, but it is not admissible
18 to show the private understandings of the parties as to the meaning of such words.”).

19 What may be relevant, if a contract is held to be ambiguous, is evidence of the
20 communicated, mutual intent of the parties. *See* Cal. Civ. Code §§ 1649; Cal. Civ. Proc. Code
21 § 1860; *Ribiero v. Dotson*, 187 Cal. App. 3d 819 (1960) (“[W]hen the language of a contract is
22 fairly susceptible to one of two constructions (i.e., when it is ambiguous) extrinsic evidence may
23 be considered not to vary or modify the terms of the agreement but to aid the court in ascertaining
24 the true intent of the parties.”); *see also Alex Robertson Co. v. Imperial Cas. & Idem. Co.*, 8 Cal.
25 App. 4th 338, 346 (1992) (holding that, because a contract “must be interpreted to give effect to
26 the *mutual* intention of the parties,” evidence of a party’s subjective intent is irrelevant in the
27 absence of any evidence that “this intent was ever communicated” to the other party) (emphasis in
28 original). Neither Mr. Jobs’s undisclosed subjective understanding of the Download Agreements

1 nor the views expressed in *Thoughts on Music* constitute the type of parol evidence that may be
 2 admissible to interpret the mutual intention of the parties to the contract. Because the evidence
 3 Plaintiffs seek from Mr. Jobs is immaterial to the Action, the Order is in clear error and must be
 4 set aside.

5 **2. The Order Is Contrary to Law Because It Permits the Deposition of a**
 6 **Non-Party Apex Witness Without a Showing of Exhaustion of Other**
 7 **Sources.**

8 The Order's holding that, "[a]bsent at least *some* actual showing of undue burden, there is
 9 no legal authority for requiring Defendants [sic] to use purportedly less burdensome means of
 10 obtaining the discovery before allowing 'apex' depositions," is contrary to the law. The Federal
 11 Rules of Civil Procedure require the court to limit discovery "if it determines that the discovery
 12 sought is . . . obtainable from some other sources that is more convenient, less burdensome, or
 13 less expensive." *See* Fed. R. Civ. P. 26(b)(2)(C); *see also* Fed. R. Civ. P. 45(c)(3) (setting forth
 14 court's power to quash or modify unduly burdensome subpoenas); *Nidec Corp. v. Victor Co.*, ___
 15 F. Supp. 2d ___, 2007 WL 1994171, at *1 (N.D. Cal. July 5, 2007) (holding that motion to quash
 16 should be granted when non-party discovery sought is "obtainable from a source more direct,
 17 convenient, and less burdensome").

18 The Order's formulation of the law ignores the inherent burden imposed by non-party
 19 discovery, particularly when the non-party is a busy CEO at the apex of corporate management.
 20 *See Del Campo v. Kennedy*, 236 F.R.D. 454, 458 (N.D. Cal. 2006) ("Underlying the protections
 21 of Rule 45 is the recognition that 'the word non-party serves a constant reminder of the reasons
 22 for the limitations that characterize third party discovery.'") (quoting *Dart Indus.*, 649 F.2d at
 23 649). Courts have uniformly recognized the major burden imposed by third-party discovery and
 24 held that a subpoenaed individual's non-party status is significant in determining whether the
 25 discovery sought is appropriate. *See Dart Indus.*, 649 F.2d at 649 (holding that trial court must
 26 impose restrictions on non-party discovery to "protect third parties from harassment,
 27 inconvenience, or disclosure of confidential documents"); *Jack Frost Lab. Inc. v. Physicians &*
 28 *Nurses Mfg. Corp.*, No. 92 Civ 9264 (MGC), 1994 WL 9690, at *2 (S.D.N.Y. Jan. 13, 1994)
 ("[T]he most obvious burden is borne by the non-party witness, and we are instructed to be

1 particularly sensitive to any prejudice to non-litigants drawn against their will into the legal
 2 disputes of others.”). The Order’s failure to consider the burden imposed by a deposition on an
 3 apex witness of a non-party constitutes clear error.

4 The Order is also inconsistent with the long line of cases holding that, when the deposition
 5 of an apex witness is sought, the court must consider the relatively high likelihood of harassment
 6 and burden, which will often outweigh the potential benefits of the discovery. *See, e.g., Salter v.*
 7 *Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Celerity, Inc.*, 2007 WL 205067 at *2-3; *Baine v.*
 8 *Gen. Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Ala. 1991); *Mulvey*, 106 F.R.D. at 366 (corporate
 9 officers are “easily subjected to unwarranted harassment and abuse”). The purpose of the apex
 10 doctrine – to prevent unnecessary harassment of prominent corporate individuals – is undermined
 11 by the Order’s failure to require Plaintiffs to exhaust less burdensome means of obtaining
 12 discovery.³ *See Celerity, Inc.*, 2007 WL 205067 at *2-3; *Mulvey*, 106 F.R.D. at 366. Such a
 13 result would permit parties to use the discovery process to harass companies and their highest
 14 level corporate managers, even when less burdensome sources of discovery are readily available.
 15 The law does not support such a result.

16 **B. Because Plaintiffs Failed to Raise Mr. Jobs’s Participation in Executing the**
 17 **Download Agreements During the Meet and Confer Discussions, This Court**
 18 **Should Consider the Additional Factual Declarations.**

19 The Court should consider the declarations of Eddy Cue and Kevin Saul submitted in
 20 support of Mr. Jobs’s Objections to the Order. The declarations are offered to refute new
 21 arguments presented by Plaintiffs at the hearing on the Motion for Protective Order. During the
 22 meet and confer discussions preceding the Motion, Plaintiffs insisted that Mr. Jobs’s essay,
 23 *Thoughts on Music*, was the sole basis for proceeding with a deposition of Mr. Jobs. (Vandell
 24 Decl. ¶ 13.) Plaintiffs never sought Mr. Jobs’s deposition on the basis of his execution of one of

25 ³ Even if the Court could justify its refusal to apply the apex doctrine to Mr. Jobs’s Motion, its
 26 refusal to require Plaintiffs to exhaust alternative sources of discovery would still be in error
 27 because it ignores the strong evidence of harassment manifested by the deposition subpoena. As
 28 Mr. Jobs argued in his Motion and Reply brief, Plaintiffs’ conduct in serving the deposition
 subpoena during the course of contentious negotiations over Plaintiffs’ document demands
 strongly suggests that their primary motivation in seeking Mr. Jobs’s deposition is to harass
 Apple. (Reply Brief (Docket #10) at 6.) It is clear error to let Mr. Jobs’s deposition proceed in
 the face of such clear potential for harassment.

1 the Download Agreements, or his role in the negotiation and drafting of those agreements. (*Id.*
 2 ¶ 16.) Accordingly, the moving papers focused on showing that the *Thoughts on Music* essay
 3 alone was irrelevant to the parties' contract dispute and did not afford proper grounds for an apex
 4 deposition.

5 At the hearing, Plaintiffs insisted that Mr. Jobs's execution of a Download Agreement was
 6 a sufficient basis to justify his deposition. The Order, moreover, relies on both his execution of
 7 the agreement and the essay. Because the issue of Mr. Jobs's actual involvement with the
 8 negotiation, drafting and execution of the Download Agreements – as opposed to his views in the
 9 *Thoughts on Music* – was not properly raised before the motion was filed, the Court should
 10 exercise its discretion to consider the additional facts submitted in the declarations of Eddy Cue
 11 and Kevin Saul. *See United States v. Howell*, 231 F.3d 615, 621-22 (2000) (holding that district
 12 court “has discretion” to “consider evidence presented for the first time” in party's objection to
 13 magistrate judge's order); *Brown v. Roe*, 279 F.3d 742, 745 (9th Cir. 2002) (“[I]n making a
 14 decision on whether to consider newly offered evidence, the district court must actually exercise
 15 its discretion, rather than summarily accepting or denying the motion.”); *see also Conetta v. Nat'l*
 16 *Hair Care Ctrs., Inc.*, 236 F.3d 67, 74 (2001) (district court should also be permitted to consider
 17 new evidence when it reviews magistrate orders pursuant to 28 U.S.C. § 636(b)(1)(A)).

18 **IV. CONCLUSION**

19 For the foregoing reasons, Non-Party Steve Jobs's Objection should be sustained.
 20 Accordingly, the Court should set aside the Order and grant Non-Party's Motion for Protective
 21 Order to Quash “Apex” Deposition Subpoena.

22
 23 DATED: May 15, 2008

GEORGE A. RILEY
 O'MELVENY & MYERS LLP

24
 25 By: George Riley /s/
 26 George A. Riley
 27 Attorneys for Non-Party Deponent Steve Jobs

28 SF1:715873.1

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Attorneys for Non-Party Deponent
Steve Jobs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN THE MATTER OF A DEPOSITION
SUBPOENA SERVED IN:

F.B.T. PRODUCTIONS, LLC AND EM2M,
LLC,

Plaintiffs,

v.

AFTERMATH RECORDS, INTERSCOPE
RECORDS, UMG RECORDING, INC., and
ARY, INC.,

Defendants.

Case No. 08-80040 Misc. RMW (PVT)

[Related to Case No. CV 07-3314 PSG
(MANx) (C.D. Cal.)]

**[PROPOSED] ORDER SUSTAINING
NON-PARTY STEVE JOBS'S
OBJECTION TO ORDER DENYING
MR. JOBS'S MOTION FOR
PROTECTIVE ORDER TO QUASH
"APEX" DEPOSITION SUBPOENA**

1 On May 15, 2008, Non-Party Deponent Steve Jobs timely filed an objection to Magistrate
2 Judge Patricia V. Trumbull's Order Denying Non-Party Steve Jobs's Motion to Quash Subpoena
3 (the "Order"). Upon consideration of the papers filed and oral argument presented, and for good
4 cause appearing:

5 **IT IS HEREBY ORDERED** that Steve Jobs's Objection to Magistrate Judge Patricia V.
6 Trumbull's Order Denying Non-Party Steve Jobs's Motion to Quash Subpoena is SUSTAINED.

7 The Order is hereby set aside, and Non-Party Steve Jobs's Motion for Protective Order to
8 Quash "Apex" Deposition Subpoena is GRANTED.

9
10 DATED: _____

HONORABLE RONALD M. WHYTE

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Steve Jobs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN THE MATTER OF A DEPOSITION
SUBPOENA SERVED IN:

F.B.T. PRODUCTIONS, LLC AND EM2M,
LLC,

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v.

AFTERMATH RECORDS, INTERSCOPE
RECORDS, UMG RECORDING, INC., and
ARY, INC.,

Defendants.

Case No. 08-80040 Misc. RMW (PVT)

[Related to Case No. CV 07-3314 PSG
(MANx) (C.D. Cal.)]

**DECLARATION OF EDDY CUE IN
SUPPORT OF NON-PARTY'S
OBJECTION TO ORDER DENYING
NON-PARTY'S MOTION FOR
PROTECTIVE ORDER TO QUASH
"APEX" DEPOSITION SUBPOENA**

DECLARATION OF EDDY CUE

(1) I am Vice President of iTunes at Apple Computer, Inc. ("Apple"). I have been employed by Apple since 1989. I am responsible for all aspects in relation to operating iTunes Music Store. I have personal knowledge of the matters set forth herein, and would competently testify thereto under oath if called as a witness. I submit this declaration in support of the Objection to the Magistrate Judge's Order denying deponent's motion for a protective order to prevent the deposition of Steve Jobs, Apple's founder, Chairman and chief executive officer.

(2) Apple is not a party to the underlying proceeding, *F.B.T. Productions, LLC v. Aftermath Records*, Case No. CV07-3314 PSG (MANx) (C.D. Cal.) (the "FBT Action").

(3) Mr. Jobs and Apple are not parties to any agreements (the "UMG Agreements") between Plaintiffs and Defendants Aftermath Records, Interscope Records, UMG Recordings, Inc. and Ary, Inc. (the "UMG Defendants") regarding master recordings of performances by Marshall Mathers (the "Eminem Masters").

(4) Neither Jobs nor Apple had any role in negotiating, drafting, or executing the UMG Agreements between Plaintiffs and Defendants.

(5) Apple has no agreements with Plaintiffs regarding the Eminem Masters for the delivery of music purchased on iTunes. Content owned or controlled by UMG Defendants is sold through iTunes pursuant to a series of confidential master online distribution agreements with Apple entitled "Digital Music Download Sales Agreements" ("Download Agreements"). The Download Agreements relate generally to the large catalog of records owned or controlled by UMG and do not specify Eminem or any other particular individual artists or specific content.

(6) The first Download Agreement was entered into on December 13, 2002. I was a member of the team of negotiators that was assembled to work through the technical and legal details. The team consisted of Bud Tribble, James Higa, Jeff Robin, Kevin Saul, and myself. Steve Jobs was not part of the negotiating team.

(7) Mr. Jobs was not involved with negotiations relating to the legal terms governing the transfer of rights associated with the UMG Defendants' sound recordings.

1 (8) Since the inception of the iTunes Music Store in 2002, I have been and continue to
2 be the senior business negotiator of agreements between Apple and all of the major record labels
3 relating to the sale of music on the iTunes Music Store.

4 (9) On behalf of Apple, I signed the Amended and Restated Download Agreement,
5 dated April 26, 2006, which is the current and effective iteration of the Download Agreement. I
6 also signed the First through Fourth Amendments to the Amended and Restated Download
7 Agreement.

8 (10) On June 18, 2007, my deposition was taken by the plaintiffs in *Bridgeport Music*
9 *Group, Inc., and Southfield Music, Inc., v. UMG Recordings, Inc., Napster, LLC, Apple*
10 *Computer, Inc., and Yahoo!, Inc.*, Case No. 05 Civ. 6430 (VM) (KNF) (S.D.N.Y) (the
11 "Bridgeport Action"). The attorneys for plaintiffs were King & Barrow. My deposition was
12 taken by Richard S. Busch.

13 (11) During the Bridgeport Action deposition I was questioned at some length about the
14 essay written by Steve Jobs, entitled *Thoughts on Music*. As I explained at my deposition, I
15 reviewed the essay before it was published and provided comments to Mr. Jobs. Some of my
16 comments were incorporated into the published essay. I answered all of the questions that were
17 asked of me about *Thoughts on Music* during my Bridgeport Action deposition fully and
18 completely.

19 (12) During the Bridgeport Action deposition I was also questioned about the structure
20 of the agreement between UMG and Apple. I answered those questions fully and completely.

21 (13) The Bridgeport Action, in which Apple is a defendant, is still ongoing.

22
23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct.

25 Executed this 15 day of May, 2008 in Cupertino, California.

26
27 
28

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Attorneys for Non-Party Deponent
Steve Jobs

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN THE MATTER OF A DEPOSITION
SUBPOENA SERVED IN:

F.B.T. PRODUCTIONS, LLC AND EM2M,
LLC,

Plaintiffs,

v.

AFTERMATH RECORDS, INTERSCOPE
RECORDS, UMG RECORDING, INC., and
ARY, INC.,

Defendants.

Case No. 08-80040 Misc. RMW (PVT)

[Related to Case No. CV 07-3314 PSG
(MANx) (C.D. Cal.)]

**DECLARATION OF KEVIN SAUL IN
SUPPORT OF NON-PARTY'S
OBJECTION TO ORDER DENYING
NON-PARTY'S MOTION FOR
PROTECTIVE ORDER TO QUASH
"APEX" DEPOSITION SUBPOENA**

DECLARATION OF KEVIN SAUL

(1) I am Senior Director in the Legal Department of Apple Inc. ("Apple"). Among other duties, I have the responsibility for providing legal support to the iTunes business. I am licensed to practice law in the State of California. I have personal knowledge of the matters set forth herein, and would competently testify thereto under oath if called as a witness. I submit this declaration in support of the Objection to the Magistrate Judge's Order denying deponent's motion for a protective order to prevent the deposition of Steve Jobs, Apple's founder, Chairman and chief executive officer.

(2) Apple is not a party to the underlying proceeding, *F.B.T. Productions, LLC v. Aftermath Records*, Case No. CV07-3314 PSG (MANx) (C.D. Cal.) (the "FBT Action").

(3) Mr. Jobs and Apple are not parties to any agreements (the "UMG Agreements") between Plaintiffs and Defendants Aftermath Records, Interscope Records, UMG Recordings, Inc. and Ary, Inc. (the "UMG Defendants") regarding master recordings of performances by Marshall Mathers (the "Eminem Masters").

(4) Neither Jobs nor Apple had any role in negotiating, drafting, or executing the UMG Agreements between Plaintiffs and Defendants.

(5) Apple has no agreements with Plaintiffs regarding the Eminem Masters for the delivery of music purchased on iTunes. Content owned or controlled by UMG Defendants is sold through iTunes pursuant to a series of confidential master online distribution agreements with Apple entitled "Digital Music Download Sales Agreements" ("Download Agreements"). The Download Agreements relate generally to the large catalog of records owned or controlled by UMG and do not specify Eminem or any other particular individual artists or specific content.

(6) The first Download Agreement was entered into on December 13, 2002. Negotiations for this agreement began in the latter half of 2002. A team of negotiators was assembled to work through the technical and legal details. The team consisted of Eddy Cue, Bud Tribble, James Higa, Jeff Robbin and me. Steve Jobs was not part of the negotiating team and did not attend the team's negotiating sessions.

(7) Apple's negotiating team represented a variety of disciplines. Eddy Cue was vice

1 president of Applications and Internet Services. Bud Tribble was vice president of Software
2 Technology. James Higa was Senior Director, Office of the CEO. Jeff Robbin was Vice
3 President of Engineering for the Applications Group. I was legal counsel to Apple. Apple did
4 not have the assistance of outside counsel in negotiating this agreement.

5 (8) The negotiations over the Download Agreement were complex and protracted.
6 My primary contact at UMG was David Weinberg, who was vice president, Business and Legal
7 Affairs for Universal's digital arm, eLabs. The negotiations covered all the details that appeared
8 in the final Download Agreement, including the legal terms governing the scope of authority
9 granted to Apple for the distribution of content owned by UMG.. The structure of the agreement,
10 its legal requirements, the definition of terms appearing in the agreement, and all other legal and
11 technical requirements were the responsibility of the negotiating team. Mr. Jobs, to the extent he
12 had any involvement in negotiating this agreement, was engaged solely providing direction in
13 determining business points such as price. Apple's negotiating team, and not Mr. Jobs, resolved
14 the form and legal content of the final agreement through extensive discussions with UMG. Mr.
15 Weinberg and I were responsible for drafting the final terms of the Download Agreement.

16
17 I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct.

19
20 Executed this ____ day of May, 2008 in Cupertino, California.

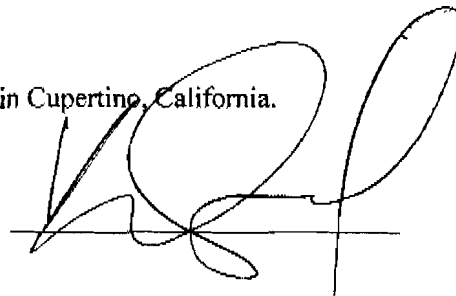
21
22 _____
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28

Apple did not have ~~the~~ assistance of outside counsel in negotiating this agreement.

(8) The negotiations over the Download Agreement **were** complex and protracted. My primary contact at UMG was David Weinberg, who **was vice** president, Business **and** Legal **Affairs** for Universal's digital arm, eLabs. The negotiations covered all the details that appeared in the final Download **Agreement**, including **the legal** terms **govcming** the scope of authority granted to Apple for **the** distribution of content owned by UMG.. The structure of **the** agreement, its **legal** requirements, the definition of terms appearing in the agreement, **and** all other legal and technical requirements were the responsibility of the **negotiating** team. Mr. Jobs, to the extent he had any involvement in negotiating this agreement, was engaged solely providing direction in **determining** business points such as price. Apple's **negotiating** team, and not Mr. **Jobs**, resolved the ~~form~~ and legal content of ~~the~~ final agreement through extensive discussions **with** UMG. Mr. **Weinberg** and I were responsible for drafting the final **terms** of the Download Agreement.

I declare under penalty **of** perjury under the **laws of the** State of **California** that the foregoing is true and correct.

Executed this d a y of May, 2008 in Cupertino, California.

A handwritten signature in black ink, appearing to be 'David Weinberg', written over a horizontal line.

SF1:715596.2

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Attorneys for Non-Party Deponent Steve Jobs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN THE MATTER OF A DEPOSITION
SUBPOENA SERVED IN:

F.B.T. PRODUCTIONS, LLC AND EM2M,
LLC,

Plaintiffs,

v.

AFTERMATH RECORDS, INTERSCOPE
RECORDS, UMG RECORDING, INC.,
AND ARY, INC.,

Defendants.

Case No. 08-80040 Misc. RMW (PVT)

[Related to Case No. CV07-3314 PSG (MANx)
(C.D. Cal.)]

**DECLARATION OF COLIN B. VANDELL
IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING
MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION
SUBPOENA**

DECLARATION OF COLIN B. VANDELL

(1) I am an attorney at the law firm of Latham & Watkins LLP, counsel to non-party Apple, Inc. ("Apple") in the above-captioned matter, and am licensed to practice law in the State of California. I have personal knowledge of the matters set forth herein, and would competently testify thereto under oath if called as a witness. I submit this Declaration in support of the filing of non-party Steve Jobs's Objection to the Order denying Mr. Jobs's Motion for Protective Order to Quash the Apex deposition subpoena that Plaintiffs F.B.T. Production, LLC and Em2M, LLC ("Plaintiffs") served on Mr. Jobs.

(2) The underlying proceeding, *F.B.T. Productions, LLC v. Aftermath Records*, Case No. CV07-3314 PSG (MANx) (C.D. Cal.) (the "Action"), was commenced by Plaintiffs on May 21, 2007, against Defendants Aftermath Records, Interscope Records, UMG Recordings, Inc., and Ary, Inc. (the "UMG Defendants"), asserting claims for breach of contract and declaratory judgment.

(3) Plaintiffs filed a First Amended Complaint (the "Complaint") on June 13, 2007, again asserting breach of contract and declaratory judgment claims. (Attached hereto as Exhibit A ("Ex. A") is a true and correct copy of the Complaint.)

(4) The Action alleges that Defendants have breached certain agreements ("UMG Agreements") relating to the payment of royalties for recordings of performances by the artist known as Eminem ("Eminem Masters"). (Ex. A (Complaint).)

(5) According to the Complaint, Defendants must pay royalties at a rate of 50% "on masters licensed by us or our licensees to others for their manufacture and sale of records or for any other use." (Ex. A. (Complaint at ¶ 29).) Plaintiffs contend that this provision governs the payment of royalties for the sale of digital downloads, but that Defendants have erroneously calculated the royalties under the "distribution" provisions of the UMG Agreements at a 12% royalty rate. (Ex. A. (Complaint at ¶ 35).)

(6) On January 11, 2008, Plaintiffs issued a subpoena for documents from Apple (the "Apple Document Subpoena") with numerous broad, irrelevant, and vague requests.

1 (Attached hereto as Exhibit B ("Ex. B") is a true and correct copy of the Apple Document
2 Subpoena.)

3 (7) The Apple Document Subpoena was served on Apple in violation of
4 Federal Rule of Civil Procedure 45. No prior notice was provided to Defendants. (Attached
5 hereto as Exhibit C ("Ex. C") is a true and correct copy of a letter from UMG Defendants'
6 counsel to Plaintiffs' counsel, dated Jan. 22, 2008, that details the violation.)

7 (8) The Apple Document Subpoena demanded, *inter alia*, any and all
8 agreements – and all communications and other documents relating in any way to such
9 agreements – between Apple and UMG regarding music distribution. (Ex. B (Apple Document
10 Subpoena).)

11 (9) Apple conferred numerous times with Plaintiffs in a good faith attempt to
12 resolve the overbreadth of the Apple Document Subpoena.

13 (10) In connection with the meet and confer process regarding the Apple
14 Document Subpoena, Apple offered to provide a number of documents. These documents
15 included the agreements between Apple and any of the UMG Defendants (and any amendments)
16 which pertain to distribution of the Eminem Masters (the "Digital Music Download Sales
17 Agreements," or "Download Agreements"). Plaintiffs refused the offer and instead filed a
18 motion to compel further responses to the Apple Document Subpoena in the Central District of
19 California, in front of Magistrate Judge Nagle.

20 (11) During and after the hearing on April 29, 2008, regarding the Apple
21 Document Subpoena, Judge Nagle denied six of Plaintiffs' nine document requests in the
22 subpoena, and ordered the production of: (i) "Apple/UMG Agreements" regarding the digital
23 distribution of music; (ii) non-privileged documents from the computers of Kevin Saul and Eddy
24 Cue regarding the drafting and negotiation of the Apple/UMG Agreements; (iii) documents using
25 the term "release" as were recently produced in a related case entitled *Bridgeport Music, Inc. v.*
26 *UMG Recordings, Inc.*, USDC Case No. 1:05-CV-06430 VM (JCF) (S.D.N.Y.); and (iv) music
27 download reports for Eminem content. Apple is currently in the process of complying with
28

1 Judge Nagle's order. (Attached hereto as Exhibits D and E ("Ex. D" and "Ex. E") are true and
 2 correct copies of the Orders issued by Judge Nagle regarding the Apple Document Subpoena.)

3 (12) Plaintiffs served a deposition subpoena on Steve Jobs (the "Jobs
 4 Deposition Subpoena") during the Apple Document Subpoena meet and confer process.
 5 (Attached hereto as Exhibit F ("Ex. F") is a true and correct copy of the Jobs Deposition
 6 Subpoena.)

7 (13) During the meet and confer discussions required under Civil L.R. 37-1
 8 that preceded the hearing on Mr. Jobs's Motion for Protective Order, Plaintiffs' sole explanation
 9 for the relevance of Mr. Jobs's deposition was the fact that he authored the essay *Thoughts on*
 10 *Music*. (Attached hereto as Exhibit G ("Ex. G") is a true and correct copy of a letter from
 11 Plaintiffs' counsel to Mr. Jobs's counsel, dated March 13, 2008, in which Plaintiffs' counsel
 12 unequivocally states that the deposition would be "based" on the *Thoughts on Music* essay.)
 13 Plaintiffs claimed that the deposition of Mr. Jobs would seek to explore Mr. Jobs's interpretation
 14 of the term "license," which he uses in the *Thoughts on Music* essay. (Attached hereto as Exhibit
 15 H ("Ex. H") is a true and correct copy of the essay *Thoughts on Music*.)

16 (14) *Thought on Music* is a discussion of Mr. Jobs's views on why Apple uses
 17 a Digital Rights Management system to protect content offered through Apple's iTunes Store.
 18 (Ex. E.) In the article, Mr. Jobs observed that, because Apple does not own the content, "it must
 19 license the rights to distribute music from others." (Ex. H (*Thoughts on Music* at 1).)

20 (15) *Thoughts on Music* does not define the term "license," or use it in any
 21 technical or legal sense. Nowhere in the article does Mr. Jobs offer any opinion on the nature of
 22 the contractual relationships among artists, the music labels, and on-line music distributors. Mr.
 23 Jobs simply uses common terminology to underscore the fact that Apple does not own the music
 24 available through its iTunes store. (See Ex. H (*Thoughts on Music*).)

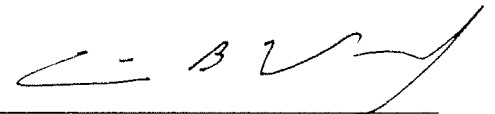
25 (16) During the hearing, Plaintiffs asserted that the deposition of Mr. Jobs was
 26 warranted because Mr. Jobs executed the original Download Agreements. Plaintiffs contend that
 27 this fact alone demonstrates that Mr. Jobs possesses a subjective understanding of the scope of
 28 the Download Agreements. Plaintiffs, however, did not make this argument during the meet and

1 confer discussions that preceded the hearing. Accordingly, Mr. Jobs did not have an opportunity
2 to properly respond, or proffer evidence, to refute the untimely assertion.

3 (17) On May 1, 2008, the Magistrate Judge issued the Order denying the
4 motion to quash. (Attached hereto as Exhibit I ("Ex. I") is a true and correct copy of the Order.)

5 I declare under penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct.

7 Executed this 15 day of May, 2008 in Los Angeles, California.

8 
9

10 Colin B. Vandell

EXHIBIT C

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

EXHIBIT A

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

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T-818 P.002/018 F-192

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Attorneys for Plaintiffs F.B.T. Productions, LLC and Em2M, LLC

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

**F.B.T. PRODUCTIONS, LLC,
 and Em2M, LLC,**

Plaintiffs,

v.

**AFTERMATH RECORDS doing
 business as AFTERMATH
 ENTERTAINMENT;
 INTERSCOPE RECORDS;
 UMG RECORDINGS, INC.; and
 ARY, INC.,**

Defendants.

Case No. CV 07-03314 PSG (MANx)

**FIRST AMENDED COMPLAINT
 FOR BREACH OF CONTRACT;
 DECLARATORY JUDGMENT**

JURY DEMAND

DOCKETED ON CM

JAN 14 2008

BY me 009

*Issued
 summons*

07 FEB 14 PM 11:20
 CIVIL & CRIMINAL COURT
 CENTRAL DISTRICT OF CALIF.
 LOS ANGELES

FBI

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T-818 P.003/010 F-132

1 Plaintiffs F.B.T. Productions, LLC, and Em2M, LLC (collectively
2 "Plaintiffs"), by and through their attorneys, for their Complaint against the
3 Defendants named above allege as follows:
4

5 **I. NATURE OF THE ACTION**

6
7 1. This action for breach of contract and declaratory judgment against
8 Defendants named herein arises from Defendants' failure to properly account to
9 and pay Plaintiffs royalties with respect to master recordings of the musical
10 performances by Marshall B. Mathers III professionally known as Eminem
11 ("Eminem") licensed from Defendants by various "Music Download Providers"
12 for reproduction and sale as more fully described hereinbelow (including but not
13 limited to iTunes, Buy.com, Napster, among others) and by "Mastertone
14 Providers" (including but not limited to Cingular Wireless, Sprint, T-Mobile, and
15 certain affiliates of Defendants, among others).
16
17

18
19 2. This action seeks remedies for Defendants' knowing violations of the
20 terms of their agreements with Plaintiffs whereby Defendants have paid Plaintiffs
21 significantly less royalties than are owed to Plaintiffs for the licensing of the
22 master recordings to Music Download Providers and Mastertone Providers.
23
24

25 3. Plaintiffs seek damages for breach of contract. Plaintiffs further seek
26 a declaration, pursuant to 28 U.S.C. §2201, that Defendants are obligated to pay
27 Plaintiffs an amount equal to fifty percent (50%) of Defendants' net receipts from
28

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T-918 P.004/010 F-132

1 the sale of records or other uses of the master sound recordings which are licensed
2 by Defendants or Defendants' licensees to others for their manufacture and sale of
3 records or for any other uses.
4

5 4. Defendants' recording agreements with Plaintiffs require Defendants
6 to pay Plaintiffs fifty percent (50%) of all net receipts received by Defendants on
7 masters licensed by Defendants or Defendants' licensees to others for
8 their manufacture and sale of records or for any other use.
9
10

11 5. Rather than paying Plaintiffs fifty percent (50%) of the net receipts
12 paid to Defendants for the licensed digital uses of master recordings featuring
13 Eminem's performances, Defendants wrongfully (a) calculate royalties by applying
14 an album royalty rate to an artificially imputed retail price of the download without
15 a packaging or configuration deduction; (b) incorrectly compute domestic digital
16 download sales using a fabricated retail price of 130% of wholesale price rather
17 than the retail price actually charged to consumers by the licensees; and (c) apply
18 territory reductions to so-called foreign digital download sales without an
19 economic or contractual basis for such reductions.
20
21
22

23 6. As a result of Defendants' intentional past and continuing contractual
24 breaches, Plaintiffs have been damaged by the loss of royalty payments in excess
25 of the jurisdictional limits of this Court which royalty payments Defendants have
26 retained for their own benefit.
27
28

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T-818 P.006/018 F-132

1 as Aftermath Entertainment ("Aftermath") is a joint venture between three entities:
2 (1) Interscope Records, a California general partnership (the "Interscope
3 Partnership"), (2) Interscope Records, an unincorporated division of UMG
4 Recordings, Inc., a Delaware corporation authorized to do business in the State of
5 California ("UMG"), and (3) ARY, Inc., a California corporation ("ARY"). The
6 Interscope Records, a Partnership, is a general partnership comprised of three
7 entities: (a) Interscope Records, an unincorporated division of UMG, (b) UMG,
8 and (c) PRI Productions, Inc., a Delaware Corporation. Based on the citizenship of
9 the entities of the joint venture, Aftermath Entertainment is a citizen of California
10 and Delaware.

11 a. UMG is organized under the laws of the State of Delaware and
12 is a citizen of that state, as is its unincorporated division, Interscope Records.
13 UMG Recordings and its divisions also are citizens of the state that is UMG's
14 principal place of business, which is California. According to its website,
15 "UMG's corporate headquarters are located at 2220 Colorado Avenue, Santa
16 Monica, CA 90404 and 1755 Broadway, New York, NY 10019." According to its
17 registration on file with the California Secretary of State, UMG is registered in the
18 State of Delaware and its offices are located at "10 Universal City Plaza, Universal
19 City, California, 91608." Lastly, UMG's critical copyright and licensing
20 department and its Film & TV Licensing departments are stationed in California as

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1 well. On information and belief, Plaintiffs allege that UMG employs a majority of
2 its employees in California, and the majority of its executive and administrative
3 functions are performed in California because (a) at least one of its two
4 headquarters are located in California, (b) UMG's critical licensing and copyright
5 divisions are located in California, and (c) a majority of its operations, both
6 executive and administrative, take place in California.
7

8
9 b. PRI Productions, Inc., (hereinafter, "PRI") is a Delaware
10 Corporation registered to do business in California. PRI's principal place of
11 business is California. It lists its address with the California Secretary of State as
12 "10 Universal City Plaza, Universal City, CA, 91608." This address is the exact
13 same address as UMG registered with the California Secretary of State. On
14 information and belief, Plaintiffs allege that PRI is involved in the entertainment
15 and music industries and performs the majority of its operations in California in
16 concert with UMG. Additionally, Plaintiffs allege on investigation and discovery
17 that PRI has no executive and no administrative staff operating outside of
18 California. All of its operations therefore take place in California. It is a citizen of
19 California and Delaware.
20

21
22 11. Interscope Records, a Partnership, is comprised of UMG and PRI, and
23 is a citizen of Delaware and California because UMG and PRI are both citizens of
24 Delaware and California.
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1 12. Interscope Records, an unincorporated division of UMG, is legally
2 indistinguishable from UMG, and its citizenship is the same as UMG. As
3 explained above, UMG is a citizen of Delaware and California.
4

5 13. ARY is a registered California Corporation. Plaintiffs allege on
6 information and belief that ARY is owned and operated solely by Andre Rommel
7 Young, Jr., professionally known as the hip-hop artist "Dr. Dre." The principal
8 place of business of ARY is California. Its registered mailing address is 10100
9 Santa Monica Blvd., Suite 1300, Los Angeles, California 90067. ARY lists its
10 agent for service of process as Howard King of the law firm King, Holmes,
11 Paterno & Berliner, LLP, located at 1900 Avenue of the Stars, 25th Floor, Los
12 Angeles, California 90067. On information and belief, Plaintiffs allege that Mr.
13 Young lives in California and runs ARY exclusively from California. Also on
14 information and belief, Plaintiffs allege that ARY has no employees other than
15 Andre R. Young, Jr. and has no assets and no operations outside of California.
16 ARY's principal place of business is California, and ARY is a citizen of California.
17

18 14. Defendant Aftermath is a citizen of California and Delaware.
19

20 15. For purposes of diversity jurisdiction, Defendants Aftermath, the
21 Interscope Partnership and UMG are all citizens of Delaware and California.
22 Defendant ARY, Inc., is a citizen of California. Plaintiffs, as citizens of Michigan,
23 are diverse from Defendants' citizenship.
24
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JURISDICTION AND VENUE

16. The jurisdiction of this Court is based upon 28 U.S.C. §1332 as there is complete diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000.00 exclusive of interest and costs. This action for declaratory judgment is brought pursuant to 28 U.S.C. §2201 which is within the exclusive jurisdiction of federal courts pursuant to 28 U.S.C. §1331. Venue is proper in this District pursuant to 28 U.S.C. §§1391 and 1400(a).

17. Personal jurisdiction over each of the Defendants is proper in this Court, among other reasons, on the grounds that (a) Defendants and/or Defendants' agents transact business in the State of California; (b) Defendants' wrongful conduct alleged herein occurred in the State of California and this District; and (c) the Agreements that are the subject of this action were entered into in this District.

18. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a)(c).

GENERAL ALLEGATIONS

19. On November 28, 1995, F.B.T. entered into an Exclusive Artist's Recording Agreement with Eminem ("1995 Agreement"). The 1995 Recording Agreement between F.B.T. and Eminem subsequently was amended on November 5, 1998, February 22, 1999 and November 28, 1999.

20. On March 9, 1998 F.B.T. and Aftermath entered into a written

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1 agreement whereby F.B.T. agreed to furnish to Aftermath the exclusive recording
2 services of "Eminem." ("March 9, 1998 Agreement") On March 9, 1998, Eminem
3 also entered into a Letter of Inducement with Aftermath whereby Eminem
4 acknowledged and approved of the agreement between F.B.T. and Aftermath for
5 Eminem's exclusive recording services. ("Letter of Inducement")
6

7
8 21. On September 27, 2000, F.B.T., Eminem and Aftermath entered into a
9 novation of the March 9, 1998 Agreement between F.B.T. and Eminem whereby
10 F.B.T. assigned all of its rights under the March 9, 1998 Agreement to Eminem,
11 Eminem assumed all of F.B.T.'s rights and obligation to Aftermath, and Aftermath
12 assumed F.B.T.'s obligations to Eminem so that Eminem would have a direct
13 relationship with Aftermath effective September 27, 2000 ("Novation"). Pursuant
14 to the Novation, F.B.T. irrevocably directed Aftermath to compute, account and
15 pay directly to Joel Martin, twenty-five percent (25%) of the monies payable to
16 F.B.T. under the Novation at the same times and on the same basis as Aftermath
17 accounts to F.B.T. All parties expressly agreed Joel Martin is a third party
18 beneficiary under the Novation.
19
20
21
22

23 22. Pursuant to the terms of the Novation, among other things, F.B.T.
24 remained an income participant with respect to all master recordings released by
25 Aftermath under the Novation and to which F.B.T. would have had rights prior to
26 the execution of the Novation (for purposes of this Complaint, the "Eminem
27
28

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1 Masters"). Further, pursuant to the terms of the Novation, the 1995 Recording
2 Agreement with its three subsequent modifications as well as the March 9, 1998
3 Agreement and Letter of Inducement were affirmed by the parties. One of the
4 terms of the Novation provided that the royalties owed by Aftermath pursuant
5 thereto were to be divided between F.B.T. and Eminem.
6

7
8 23. On or about August 22, 2003 and effective as of July 2, 2003, a new
9 agreement was entered into between Aftermath and Eminem regarding, among
10 other things, the Eminem Masters ("2003 Agreement"). Pursuant to the terms of
11 the 2003 Agreement, all "Prior Agreements" are affirmed expressly including
12 (a) the 1995 Recording Agreement and amendments thereto; (b) the March 9, 1998
13 Agreement and Letter of Inducement; and (c) the September 27, 2000 Novation.
14

15
16 24. On September 20, 2004, Joel Martin assigned all of his interests in
17 and to the 2000 Novation and under the 2003 Agreement to Em2M LLC, and all
18 payments and accountings otherwise due to Joel Martin thereafter were due to be
19 made by Defendants to Em2M LLC.
20

21
22 25. On November 1, 2004, F.B.T. and Eminem, on the one hand, and
23 Aftermath, on the other hand, entered into a written modification of the Novation.
24 ("2004 Amendment").
25

26 26. Pursuant to the terms of the foregoing agreements referenced
27 hereinabove, F.B.T. and Eminem caused certain recorded performances of Eminem
28

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1 to be delivered to Defendants, and Defendants agreed to manufacture, distribute,
2 sell, and license for sale and distribution those master recordings in various
3 configurations throughout the Universe.
4

5 27. Plaintiffs have each performed their respective material obligations
6 pursuant to the terms of each of the agreements referenced hereinabove.
7

8 28. Pursuant to the terms of the March 9, 1998 Agreement and the 2003
9 Agreement, Defendants were to provide certain remuneration to Plaintiffs,
10 including royalties, and to furnish Plaintiffs with semi-annual royalty accounting
11 statements setting forth the computations of each Plaintiff's entitlement to royalties
12 for the commercial exploitation of the Eminem Masters, which statements were to
13 be accompanied by any royalty payments due.
14

15 29. Pursuant to the terms of the March 9, 1998 Agreement and the 2003
16 Agreement, Defendants agreed to pay certain royalties as follows: "On masters
17 licensed by us or our Licensees to others for their manufacture and sale of records
18 or for any other use, your royalty shall be an amount equal to fifty percent (50%)
19 of our net receipts from the sale of those records or from those other uses of the
20 masters." The "other uses" of the Eminem Masters include, without limitation,
21 Defendants, or Defendants' [L]icensees, licensing to various Music Download
22 Providers and Mastertone Providers for digital uses, including digital downloads,
23 digital streaming and mastertones. The identities of each of the Music Download
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1 Providers and Mastertone Providers are known exclusively to Defendants.

2 30. Under the agreements entered into between Plaintiffs and Defendants,
3
4 Defendants were obligated to act in good faith in their dealings with Plaintiffs and
5 to render accurate royalty accounting statements, and to properly credit and
6 account for the royalties generated by the commercial exploitation of the Eminem
7 Masters.
8

9 31. During the period January 1, 2002 to present, Defendants or
10 Defendants' licensees have licensed the Eminem Masters to various Music
11 Download Providers including but not limited to iTunes, Buy.com, Napster, among
12 others, and Mastertone Providers (including but not limited to Cingular Wireless,
13 Sprint, T-Mobile, and certain affiliates of Defendants, among others).
14

15 32. Upon information and belief, Defendants' agreements with the Music
16 Download Providers and Mastertone Providers involve the licensing of the
17 Eminem Masters to such Music Download Providers and Mastertone Providers for
18 sale in the form of digital music files which is encompassed in the definition of
19 "other uses of the masters" as set forth in the March 9, 1998 Agreement and the
20 2003 Novation.
21

22 33. In 2005, F.B.T. and Eminem retained an accounting firm to review the
23 accounting records of Defendants and to perform a royalty audit on behalf of
24 Plaintiffs for the periods January 1, 2002 through and including June 30, 2005. On
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1 February 10, 2006, the accounting firm submitted its audit report to Defendants.
2 As a result, the February 10, 2006 audit showed, among other things, that
3 Plaintiffs, collectively, have been underpaid by Defendants for the digital uses in
4 an amount in excess of \$650,000.
5

6
7 **FIRST CAUSE OF ACTION**
8 **(BREACH OF CONTRACT)**

9 34. Plaintiffs reallege each and every allegation in Paragraphs 1 through
10 33 hereof as if fully set forth herein.

11 35. Defendants have failed to comply with the terms of the March 9, 1998
12 Agreement and the 2003 Agreement by failing to account and pay Plaintiffs fifty
13 percent (50%) of Defendants' net receipts from the digital uses of the Eminem
14 Masters by the Music Download Providers and Mastertone Providers. Defendants
15 apply an incorrect formula for calculating royalties with respect to those royalties
16 to be paid to Plaintiffs which results in Plaintiffs collectively receiving an average
17 royalty of approximately twelve percent (12%) instead of the fifty percent (50%)
18 required by the terms of the agreements.
19

20 36. On February 21, 2007, and pursuant to paragraph 15(b) of the March
21 9, 1998 Agreement and the 2003 Agreement, Plaintiffs sent written notice to
22 Defendants by certified mail, return receipt requested, advising Defendants of their
23 breach of said agreements and requesting that Defendants cure the breach within
24 thirty (30) days after the date of the notice.
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1 37. Despite said notice, Defendants have failed and refused to cure the
2 breach and continue to incorrectly calculate royalties in violation of the March 9,
3 1998 Agreement and 2003 Agreement. As a result of Defendants' improper
4 calculation of royalties, Defendants have further breached said agreements by their
5 failure (a) to account properly, (b) to credit and pay the correct amount of royalties
6 due to Plaintiffs; and (c) to render royalty statements reflecting the correct amount
7 of royalties due to Plaintiffs.
8
9

10 38. By reason of the foregoing and other acts not presently known by
11 Plaintiffs, Defendants have knowingly and materially breached its contractual
12 obligations to Plaintiffs under the March 9, 1998 Agreement and the 2003
13 Agreement, and wantonly have disregarded the rights of Plaintiffs.
14
15

16 39. Pursuant to the terms of the 2003 Agreement, should any party
17 institute any action or proceeding at law or in equity to enforce any provision of
18 the 2003 Agreement, including an action for declaratory relief, or for damages by
19 reason of an alleged breach of any provision of the 2003 Agreement, or otherwise
20 in connection with the 2003 Agreement or any of its provisions, the prevailing
21 party is entitled to recover from the non-prevailing party reasonable and actual
22 attorneys' fees and costs for services rendered to the prevailing party in such action
23 or proceeding.
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28 40. As a result of the wrongful conduct of Defendants alleged

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1 hereinabove, Plaintiffs have been damaged in an amount to be determined at the
2 time of trial, which upon information and belief is well in excess of one million
3 dollars (\$1,000,000) for the digital uses.

4
5 **SECOND CAUSE OF ACTION**
6 **(DECLARATORY JUDGMENT)**

7 41. Plaintiffs reallege each and every allegation in Paragraphs 1 through
8
9 40 hereof as if fully set forth herein.

10 42. Pursuant to 28 U.S.C. §2201, this Court may declare the rights and
11 other legal relations of any interested party seeking such declaration whether or not
12 further relief is, or could be, sought. Any such declaration shall have the force and
13 effect of a final judgment or decree and shall be reviewable as such.

14
15 43. Plaintiffs contend, and seek a declaration, that, pursuant to the March
16 9, 1998 Agreement and the 2003 Agreement, Defendants are obligated to pay
17 Plaintiffs, collectively, fifty percent (50%) of Defendants' net receipts derived
18 from the licensing by Defendants or Defendants' Licensees to others "for their
19 manufacture and sale of records or for any other uses" of the Eminem Masters,
20 including, without limitation, Music Download Providers and Mastertone
21 Providers, the identities of which are known exclusively by Defendants.
22 Defendants deny they have such an obligation under said agreements.

23
24 44. Plaintiffs have no adequate remedy at law.

25
26 45. By reason of the foregoing, there is a present controversy between
27
28

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1 Plaintiffs and Defendants for which a declaratory judgment should be entered
2 determining that the March 9, 1998 Agreement and the 2003 Agreement obligates
3 Defendants to pay Plaintiffs, collectively, fifty percent (50%) of Defendants' net
4 receipts from the licensing by Defendants or Defendants' Licensees of the Eminem
5 Masters to Music Download Providers and Mastertone Providers for sale.
6
7

8 PRAYER FOR RELIEF

9 WHEREFORE, Plaintiffs demand a jury trial against Defendants on those
10 matters to be determined by a jury and further pray for judgment against
11 Defendants, and each of them, as follows:
12

13 1. On the First Cause of Action, judgment awarding Plaintiffs
14 compensatory damages, the exact amount is to be determined at the time of trial;
15

16 2. On the Second Cause of Action, an order and judgment declaring that
17 the March 9, 1998 Agreement and the 2003 Agreement obligates Defendants to
18 pay Plaintiffs, collectively, fifty percent (50%) of Defendants' net receipts from the
19 licensing by Defendants or Defendants' Licensees to Music Download Providers,
20 Mastertone Providers, and others for digital and other licensed uses of the Eminem
21 Masters, including, without limitation, digital downloads, digital streaming and,
22 digital mastertones;
23
24

25 3. An award of reasonable and actual attorneys' fees and costs for
26 services rendered to Plaintiffs in this action;
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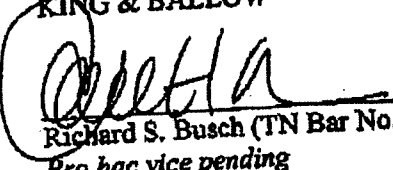
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4. An award of pre- and post-judgment interest;
5. Such other and further relief as the Court deems just and proper.

DATED: June 12, 2007

Respectfully submitted,

KING & BALLOW


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Pro hac vice pending

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Attorneys for Plaintiffs

EXHIBIT B

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the
United States District Court
Northern District of California

F.B.T. Productions, LLC, et al.

v.

Aftermath Records, et al.

SUBPOENA IN A CIVIL CASE
Case No. CV 07-3314 PSG (MANx)
Central District of California

TO: Custodian of the Records
Apple Computers, Inc.
1 Infinite Loop
Cupertino, CA 95014

☐ **YOU ARE COMMANDED** to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☐ **YOU ARE COMMANDED** to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME

☒ **YOU ARE COMMANDED** to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

Nogara Reporting Service
130 Battery Street, Suite 580
San Francisco, CA 94111

January 28, 2008
10:00 A.M.

See Exhibit A.

PLACE

DATE AND TIME

☐ **YOU ARE COMMANDED** to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE

Richard S. Busch

Plaintiff

1/14/08

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Richard S. Busch, Esq.
King & Ballow
316 Union Street
1160 Union Street Plaza
Nashville, TN 37201
(615) 259-3486

SCHEDULE A

I. Definitions

A. "You" or "Apple" refers to Apple Computer Inc. its agents, representatives, attorneys, and/or any other persons acting or purporting to act on its behalf.

B. "RIAA" shall mean the Recording Industry Association of America (RIAA), its agents, representatives, attorneys, and/or any other persons acting or purporting to act on its behalf.

C. "Aftermath" refers to Aftermath Records d/b/a Aftermath Entertainment its agents, representatives, attorneys, and/or any other persons acting or purporting to act on its behalf.

D. "Interscope" refers to Interscope Records its agents, representatives, attorneys, and/or any other persons acting or purporting to act on its behalf.

E. "UMG" or "Universal" refers to UMG Recordings, Inc., its parent company, its subsidiaries, its affiliates, and any other related company, as well as their agents, representatives, attorneys, and/or any other persons or entities acting or purporting to act on their behalf.

F. "ARY" refers to ARY, Inc. its agents, representatives, attorneys, and/or any other persons acting or purporting to act on its behalf.

G. "Document," "Electronically Stored Information," and "Things" are

1 defined to be synonymous in meaning and equal in scope to the usage of these
2 terms in FRCP Rule 34. A draft or non-identical copy is a separate document,
3 electronically stored information, or thing within the meaning of this term.
4

5 H. "Communication" shall mean any transmission of information by oral,
6 graphic, written, pictorial, or other perceptible means, including, but not limited to,
7 telephone conversations, letters, documents, memoranda, notes, telegrams,
8 facsimile, transmissions, electronic mail, meetings, and personal conversations.
9

10 I. "And" and "or" each shall be construed either conjunctively or
11 disjunctively as necessary to bring within the scope of these requests for
12 production of documents, electronically stored information, and things any
13 information or document that might otherwise be construed to be outside its scope.
14

15 J. References to the plural shall include the singular; references to the
16 singular shall include the plural.
17

18 K. References to the feminine shall include the masculine; references to
19 the masculine shall include the feminine.
20

21 L. All legal terms, accounting terms, and other technical terms associated
22 with a particular industry, profession or identifiable body of knowledge shall have
23 the meanings customarily and ordinarily associated with those terms with those
24 terms within that industry, profession or discipline.
25

26
27
28 **II. DOCUMENT, ELECTRONICALLY STORED
INFORMATION, AND THINGS REQUESTS**

1
2 1. Each and every document that in any way refers to, relates to, or
3 pertains to the formation of the agreements between you and Universal, or any
4 other record company, for the distribution of music in digital format, including but
5 not limited to, the efforts between yourself, the RIAA, and/or any other third party
6 to draft, structure, or characterize such agreements as reseller agreements or
7 otherwise, and not license agreements.
8
9

10 2. Each and every communication between yourself and the RIAA that
11 in any way relates to, refers to, or pertains to any efforts to draft, structure, or
12 characterize the agreements between yourself and Universal as reseller agreements
13 or otherwise, and not license agreements.
14
15

16 3. Each and every communication between yourself, Universal, and/or
17 any other third party that in any way relates to, refers to, or pertains to any efforts
18 to draft, structure, or characterize the agreements between yourself and Universal
19 as reseller agreements or otherwise, and not license agreements.
20
21

22 4. All drafts of the document entitled "Thoughts On Music," or
23 documents and communications related thereto, authored by Steve Jobs, and
24 released on February 6, 2007.
25

26 5. Each and every document that identifies music as an "iTunes digital
27 release," "iTunes release," or a release by iTunes.
28

6. Each and every internal document or record referencing Universal or

1 other record company, or other rights owner, in which such entity is characterized
2 as a licensor.
3

4 7. Each and every agreement in which iTunes obtained the rights to
5 release or sell an artist's music through an agreement directly with an artist, or its
6 representatives, even if Universal or other record company also executed such
7 agreement.
8

9 8. Each and every agreement in which iTunes obtained the rights to
10 release or sell an artist's music through an agreement directly with the owner,
11 publisher, or administrator of the copyright in the underling musical composition,
12 or their representatives, even if Universal or other record company also executed
13 such agreement, including but not limited to all mechanical licenses.
14

15 9. Each and every document referencing or relating to all downloads of
16 the Eminem Masters, including but not limited to any financial information related
17 thereto.
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EXHIBIT C

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

MUNGER, TOLLES & OLSON LLP

388 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

January 22, 2008

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ALAN V. FRIEDMAN
RONALD S. OLSON
RICHARD S. BUSCH
DENNIS C. BROWN
ROBERT E. DUBOIS
JEFFREY L. WEINBERGER
ROBERT L. AULIN
CARY B. LORANT
CHARLES D. BIGDAL
RONALD R. HESTER
DREWERY A. STONE
VALMA S. MARTINEZ
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STEPHEN H. KRISTOVICH
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OLSEN D. POWERS
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RONALD C. HUGHMAN
PATRICK J. CAFFERTY, JR.
JAY H. FLAHERTY
D'ANIEL M. MILLER
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MARK R. EPSTEIN
HARRY WEISSMANN
KEVIN S. ALLRED
BART H. WILLIAMS
JEFFREY A. HEINTE
JUDITH T. KITANO
HARVEY LINSLEY WILES
MARK T.D. DWORKIN
JEROME C. ROTH
SIEMER D. ROSE
JEFFREY L. BLECH

GARTH T. VINCIGU
TED DANE
MARK SHINGEMAN
STUART H. SCHACHT
MARTIN D. BORN
DANIEL P. COLLINS
RICHARD S. DROOGAN
ROBERT L. DELL ANELLO
JOHN THOMAS E. ALTHAM
HARRY AMY TODD
BRUCE A. ARBOTT
MICHAEL J. O'BULLYAN
SCOTT M. ELIAS
DAVID S. GOLDMAN
BURTON A. GRIBBS
KEVIN S. HARRIS
MOJIB HANNO
KRISTIN A. ESCALANTE
DAVID C. DOWD
ANDREA WELLS JEFFRIES
PETER A. DETRE
DANA S. TREIBER
CARL M. MOOR
DAVID H. ROSENBERG
DAVID H. FRY
LISA J. DENNEY
MALCOLM A. HENCKES
GREGORY J. WEINBAUM
TAMARA J. GOSSETT
JAMES C. RUTEN
J. MARTIN WILHITE
RICHARD ST. JOHN
ROBERT M. BOWLA
LURE LI
CAROLYN HOCKER LUEDKE
C. DAVID LEE
MARK N. NIM
BRETT L. HODIN
SEAN KROVITZ
BRYAN R. BASSO
LYNDA B. GOLDMAN
NATHANIEL PHOBS STONE
FRED A. HOWLEY, JR.
JOSEPH B. HANCOCK
MONIKA S. WIEBER
LYNN HEALEY SCHWEDT
RANDALL O. SCHWEDT

SARON M. MAY
SHOUT E. MILLER
MARIA REITERMAN
KAMUEL F. CACHAN
ERIC J. LORENZINI
KATHERINE K. HANNO
KATHERINE K. FORSTER
ROSEMARIE T. RING
JOSEPH J. YARRA
BLANCA FROMM YOUNG
DEDE GUTELAU
KATE S. ANDERSON
ALISON J. HARRINGTON
E. BONNEY WINE
SAMUEL H. WEINSTEIN
PAUL H. ROYER
KIT JOHNSON
JAY K. SHYIA
RUSAN THAM BOYD
JENNIFER L. ROSE
TODD J. ROSEN
DANIEL L. GUYER
BRYAN R. HODGINS
DEAN H. KAMMATH
DANIEL A. DAVIS-OWEN
E. MARTIN EYENADA
JASON KANTANKE
AMY C. TERRY
JONATHAN M. BLATT
JOHN R. GRYFFIN
BARBARA J. FESSLER
MICHELLE T. FRIEDLAND
J. RALPH LORRENZINI
SARA C. HAYAK
MELINDA EADES LINDHIC
ANDREW R. SOHO
DANIEL A. BECH
YONNANCE C. SCHWABE
JULIE D. GARTER
SETH GOLDMAN
PADA ISRAH RAFFERTIS
DANIEL J. POTWELL
DANIEL B. LEVIN
JOHN R. GORDAN
VICTORIA L. ROSEN
MALLORY J. CHEN
BRAD SCHWEDER

DAVID W. SMIT
JOHN Y. BRICE
ALEXANDRA LANE BURMAN
DENNYVE A. COH
MOMAN KISH
MISTY N. SHIFFORD
SHAR P. DUFF
AMIE FEINBERG
JOE B. WHITLEY
JEFFREY E. ZINSMEISTER
MONICA DOSS HANCO
KATHERINE L. HALL
KATHERINE KU
KATHERINE A. CH
SHOSHANA E. SANNETT
TINA CHANDERPOH
TERESA E. HODATA
ADAM S. BARNES
ASHFAD Q. CHOWDHURY
LEE S. TAYLOR
DEREK J. HOFFMAN
KIMBERLY D. SANCHEZ
NATHAN J. SPIEGEL
DANIEL P. SANCHEZ
BETHANY C. WOODARD
PAULA M. LEVY
CONNIE T. CHANG
DAVID C. WARD
WILLIAM E. CHANG
SHUT PM
JILL WARD
HEIDI E. ORRER
NATHAN J. SPENCE
PETER M. HOWELL
WELLEY SHIN
JACOB S. KREKAMP
PAUL J. KATZ
ANITA A. HEDMAN

A PROFESSIONAL CORPORATION

BY E-MAIL AND U.S. MAIL

Richard S. Busch, Esq.
King & Ballow
315 Union Street
1100 Union Street Plaza
Nashville, Tennessee 37201

Re: F.B.T. Productions, LLC et al. v. Aftermath Records et al., Case No. CV 07-3314-PSG (C.D. Cal.)

Dear Mr. Busch:

We have become aware that you have been serving subpoenas on third parties in the above-referenced case without complying with your obligations under Rule 45 to provide notice of the subpoenas to us.

We are aware of four apparent instances of your violating Rule 45 in this manner: your subpoena to the Recording Industry Association of America, your subpoena to Apple Inc., and your two subpoenas to MusicNet. We only became aware of the subpoenas to MusicNet because your office inadvertently mailed the originals of these subpoenas to us. We still have not received the notice that Rule 45(b)(1) requires for any subpoenas you have issued.

Among other things, the notice rule allows parties to the case an opportunity to object to a requested production. See 1991 Adv. Comm. Note to Subdivision (b); *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1173 (10th Cir. 2003). Your failure to provide the required notice threatens defendants' rights. The Court may strike your subpoenas or impose

WRITERS DIRECT LINE
(213) 683-9238
(213) 683-4038 FAX
Kelly.Klaus@mto.com

MUNGER, TOLLES & OLSON LLP

Richard S. Busch, Esq.

January 22, 2008

Page 2

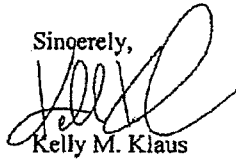
other sanctions on account of your violations. See *Florida Media, Inc. v. World Publs., LLC*, 236 F.R.D. 693, 695 (M.D. Fla. 2006). Our clients do not waive, but rather expressly reserve, all of their rights to relief on account of your non-compliance with the Rules to date.

If you have served any subpoenas without giving us notice under Rule 45(b)(1), please notify us immediately of the relevant parties and send us copies of all papers you have served on them. Please comply with the Rules on a going-forward basis.

Finally, as you know from your representation of the plaintiff LLCs in the *Eight Mile v. Apple* action, we represent Apple in that case. Your subpoena to Apple in this case obviously concerns matters related to the *Eight Mile* action. Your attempt to communicate directly with Apple on matters that obviously are related to that litigation may be a violation of the rules of professional conduct. Please be sure that this does not happen again.

As requested by your office, we are returning the originals of the four subpoenas referenced above with the original of this letter. Thank you for your immediate attention to these matters.

Sincerely,



Kelly M. Klaus

Enclosures (with mailed copy only)

EXHIBIT D

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-3314-PSG (MANx) Date April 29, 2008

Title *F.B.T. Productions, LLC, et al. v. Reel Media International, et al.*

Present: The Honorable MARGARET A. NAGLE, UNITED STATES MAGISTRATE JUDGE

E. Carson

CS

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Paul H. Duvall
Mark L. Block

Daniel Scott Schecter
Colin B. Vandell

- Proceedings:**
1. Plaintiffs' and NonParty Apple's Application To File Joint Stipulation Of Plaintiffs F.B.T. Production, LLC, et al. And NonParty Apple Re Plaintiffs' Motion To Compel Further Response To Subpoena Under Seal ("Joint Application")
 2. Joint Stipulation Re Plaintiffs' Motion To Compel Further Response To Subpoena Served On NonParty Apple Computers, Inc. ("Plaintiffs' Motion")

The case is called. Paul H. Duvall, of King and Ballow, and Mark L. Block, of Christensen, Glaser, Fink, Jacobs, Weil & Shapiro, appear on behalf of Plaintiffs. Glenn D. Pomerantz and Melinda Eades LeMoine, of Munger, Tolles & Olson, LLP appear on behalf of defendants. Daniel Scott Schecter and Colin B. Vandell, of Latham Watkins, appear on behalf of NonParty Apple Inc. ("Apple").

The Court denies the Joint Application, without prejudice, and orders that by no later than Tuesday, May 6, 2008, counsel for Apple shall file a declaration from an Apple employee **which details sufficient facts** to establish that proprietary, confidential information is set forth in the Joint Stipulation and/or related pleadings that justifies the filing of certain pleadings, or portions thereof, under seal. Pending Apple's submission of that declaration, the Joint Stipulation and related pleadings shall remain lodged under seal and shall not be filed.

The Court hears argument regarding Plaintiffs' Motion, which is granted, in part, and denied, in part, as follows:

Plaintiffs' Motion is tentatively granted with respect to Request No. 1. NonParty Apple shall produce all agreements between UMG and Apple concerning downloads of Plaintiffs' music, and all drafts and communications regarding those agreements, which are maintained in the files of the principal negotiators of these agreements. If documents are withheld on the basis of attorney client privilege or attorney work product doctrine, then a privilege log shall also be prepared and served. Plaintiffs' and Apple's counsel shall meet and confer in a good faith effort to define more clearly the scope of the files to be searched for responsive documents. After the meet and confer

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-3314-PSG (MANx) Date April 29, 2008

Title *F.B.T. Productions, LLC, et al. v. Reel Media International, et al.*

process, Plaintiffs' counsel shall prepare a proposed order, which accurately reflects the Court's order with respect to the production. That order shall be submitted to Apple's counsel for review, and then lodged with the Court by no later than May 5, 2008.

Plaintiffs' Motion is denied as to Request No. 2 based upon Apple's representation that it does not have any documents regarding the communications between RIAA and Apple sought by this request in its possession or under its control.

Plaintiffs' Motion is denied as to Request No. 3.

Plaintiffs' Motion as to Request No. 4 is denied, without prejudice to rehearing if drafts of the subject Steve Jobs essay are referenced by Mr. Jobs in his deposition in this case.

Plaintiffs' Motion is granted as to Request No. 5. Apple shall produce all documents responsive to this request, which were recently produced in the case entitled Bridgeport Music, Inc. v. UMG Recordings, Inc., USDC Case No. 1:05-CV-06430 VM (JCF) (S.D.N.Y.).

Plaintiffs' Motion is denied as to Request No. 6.

Plaintiffs' Motion is denied as to Request No. 7.

Plaintiffs' Motion is denied as to Request No. 8.

Plaintiffs' Motion is granted as to Request No. 9. Apple shall produce all music download reports for Eminem content. The production shall be made by no later than May 9, 2008.

The Court schedules a follow-up telephonic status conference at 1:00 p.m. on Thursday, May 1, 2008. The Court will initiate the call with counsel.

IT IS SO ORDERED.

Initials of
Preparer

1 : 25
efc

EXHIBIT E

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-3314-PSG (MANx)	Date	May 6, 2008
Title	<i>F.B.T. Productions, LLC, et al. v. Reel Media International, et al.</i>		

Present: The Honorable	MARGARET A. NAGLE, UNITED STATES MAGISTRATE JUDGE
------------------------	---

E. Carson	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None Present

None Present

Proceedings: (IN CHAMBERS) Order Re Plaintiffs' Motion To Compel Further Response To Subpoena Served On NonParty Apple Inc.

On April 8, 2008, Plaintiffs F.B. T. Productions, LLC and Em2M, LLC ("Plaintiffs") filed a Joint Stipulation regarding plaintiffs' motion to compel responses to their subpoena duces tecum served on NonParty Apple Inc. ("Apple"). On April 29, 2008, the Court heard oral argument and ordered plaintiffs and Apple to meet and confer further in order to limit reasonably the scope of the search to be conducted by Apple for documents responsive to Request for Production No. 1. On May 5, 2008, plaintiffs and Apple each lodged a proposed order regarding the production of documents responsive to Request No. 1. The Court now rules as follows:

1. Plaintiffs' motion to compel with regard to Request No. 1 is granted to the following extent:
 - a. On or before May 12, 2008, Apple shall produce, subject to the protective order entered into by plaintiffs and defendants, the following agreements:
 - (i) Apple/UMG agreements of December 2002 and 2006;
 - (ii) Amendments to Apple/UMG agreements dated October 2005, April 2006, and March 2007;
 - (iii) All other Apple/UMG agreements as described in Request No. 1 from 2001, to the present.
 - b. On or before May 12, 2008, Apple shall examine the files and computers utilized by Kevin Saul and Eddie Cue and produce the following documents: All non-privileged communications, including, but not limited to, emails

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-3314-PSG (MANx) Date May 6, 2008

Title *F.B.T. Productions, LLC, et al. v. Reel Media International, et al.*

between and among Apple and defendants regarding the drafting and negotiation of the Apple/UMG agreements.

- c. On or before May 14, 2008, Apple shall produce a privilege log pertaining to the production as described above.
- d. To the extent the production of documents of Kevin Saul and/or Eddie Cue indicates that Steve Jobs was involved in the negotiation or formation of any of the agreements (other than as a mere signatory to said agreement(s)), including, but not limited to, the initial Apple/UMG agreement dated December 2002, the parties shall immediately communicate telephonically with the Court to address whether a hearing should be promptly scheduled to determine if good cause exists to examine the files and computers possessed or controlled by Steve Jobs to locate documents responsive to Request No. 1. The Court directs counsel to meet and confer before May 12, 2008, if counsel for Apple determines, during the examination of the Saul and Cue documents, that the files of Mr. Jobs likely contain additional documents responsive to Request No. 1.

IT IS SO ORDERED.

Initials of
Preparer

efc

EXHIBIT F

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

Richard S. Busch (TN Bar No. 014594)
Attorney Pro Hac Vice
KING & BALLOW
 315 Union Street, Suite 1100
 Nashville, TN 37201
 (615) 259-3456 Facsimile: (615) 726-5417

Paul H. Duvall (State Bar No. 73699)
KING & BALLOW
 9404 Genesee Avenue, Suite 340
 La Jolla, CA 92037-1355
 (858) 597-6000 Facsimile: (838) 597-6008

Mark L. Block (State Bar No. 115457)
 Christensen, Glaser, Fink, Jacobs, Weil, & Shapiro, LLP
 10250 Constellation Blvd., 19th Floor
 Los Angeles, CA 90067
 (310) 553-3000 Facsimile: (310) 556-2920
 Attorneys for Plaintiffs F.B.T. Productions, LLC and Em2M, LLC

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

**F.B.T. PRODUCTIONS, LLC,
 and Em2M, LLC,**

Plaintiffs,

v.

**AFTERMATH RECORDS doing
 business as AFTERMATH
 ENTERTAINMENT;
 INTERSCOPE RECORDS;
 UMG RECORDINGS, INC.; and
 ARY, INC.,**

Defendants.

Case No. CV 07-3314 PSG (MANx)

**NOTICE OF DEPOSITION OF
 STEVE JOBS**

1 TO ALL DEFENDANTS AND THEIR COUNSEL OF RECORD:



2 PLEASE TAKE NOTICE that pursuant to Rules 26 and 30 of the Federal
3 Rules of Civil Procedure, Plaintiffs F.B.T. Productions, LLC, and Em2M, LLC
4 will take the deposition upon oral examination of Steve Jobs.
5

6 The deposition will take place on March 27, 2008, at 9:00 am P.S.T. at the
7 offices of Latham & Watkins, LLP, 140 Scott Drive, Menlo Park, CA 94025, and
8 continue from day to day, Sundays and holidays excluded, until completed, before
9 a notary public or other officer authorized to administer oaths. Pursuant to Rule
10 30(b)(2), the deposition shall be recorded by videographic and stenographic means.
11

12 DATED: March 3, 2008

13 Respectfully submitted,

14
15 KING & BALLOW

16
17
18 
19 Richard S. Busch (TN Bar No. 014594) 
20 Paul H. Duvall (State Bar No. 73699)

21 - and -

22 Mark Block (State Bar No. 115457)
23 Christensen, Miller, Fink, Jacobs, Glaser

24 Attorneys for Plaintiffs
25
26
27
28

CERTIFICATE OF SERVICE**STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

I, Sherie Johnson, declare:

I am employed in the County of San Diego, State of California. I am over the age of eighteen years, and not a party to the within action. My business address is 9404 Genesee Avenue; Suite 340; La Jolla, CA 92037. On March 3, 2008, I instructed First Legal Support Services to personally serve a true copy of the attached documents entitled **NOTICE OF DEPOSITION OF STEVE JOBS** and **SUBPOENA IN A CIVIL CASE TO STEVE JOBS** upon:

Glenn D. Pomerantz, Esq.
Kelly M. Klaus, Esq.
Kimberly D. Encinas, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Attorneys for Defendants

Daniel S. Schecter, Esq.
Colin B. Vandell, Esq.
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
On behalf of Steve Jobs

I also instructed First Legal Support Services to prepare a Proof of Personal Service.

I also served a true copy of the attached documents entitled **NOTICE OF DEPOSITION OF STEVE JOBS** and **SUBPOENA IN A CIVIL CASE TO STEVE JOBS** by placing same in an addressed sealed envelope clearly labeled to identify the persons being served at the address shown below and placed said envelope for collection with the United States Postal Service located at 9404 Genesee Avenue; La Jolla, California 92037, on March 3, 2008, following ordinary business practices:

Glenn D. Pomerantz, Esq.
Kelly M. Klaus, Esq.
Kimberly D. Encinas, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Attorneys for Defendants

Daniel S. Schecter, Esq.
Colin B. Vandell, Esq.
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
On behalf of Steve Jobs

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on March 3, 2008, at La Jolla, California.


Sherie Johnson

King &
Bellow

PROOF OF SERVICE

CASE # CV 07-03314 PSG (MANX)

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the
United States District Court
Northern District of California

F.B.T. Productions, LLC, et al.

v.

Aftermath Records, et al.

SUBPOENA IN A CIVIL CASE
Case No. CV 07-3314 PSG (MANx)
Central District of California

TO: Steve Jobs, CEO Apple, Inc.
c/o Daniel S. Schacter, Esq.
Colin B. Vandell, Esq.
Latham & Watkins, LLP
644 West Fifth Street
Suite 4000
Los Angeles, CA 90071-2007

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Latham & Watkins, LLP
140 Scott Drive
Menlo Park CA 94025

March 27, 2008
9:00 AM P.S.T.

PLACE OF DEPOSITION

DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE

DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE

Richard S. Burch, Esq.
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Richard S. Burch, Esq.
King & Ballow
318 Union Street
1100 Union Street Plaza
Nashville, TN 37201
(615) 259-3458

Plaintiff

3/3/08

AO 88 (Rev. 1994) Subpoena in a Civil Case

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ DATE _____ SIGNATURE OF SERVER _____

ADDRESS OF SERVER _____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENA.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the objection and copying contemplated.

(2)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(ii) of this rule, such a person may be required to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(3) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unpatented expert's opinion or information not describing specific events or occurrences

in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assesses the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

CERTIFICATE OF SERVICE**STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

I, Sherie Johnson, declare:

I am employed in the County of San Diego, State of California. I am over the age of eighteen years, and not a party to the within action. My business address is 9404 Genesee Avenue; Suite 340; La Jolla, CA 92037. On March 3, 2008, I instructed First Legal Support Services to personally serve a true copy of the attached documents entitled **NOTICE OF DEPOSITION OF STEVE JOBS** and **SUBPOENA IN A CIVIL CASE TO STEVE JOBS** upon:

Glenn D. Pomerantz, Esq.
Kelly M. Klaus, Esq.
Kimberly D. Encinas, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Attorneys for Defendants

Daniel S. Schecter, Esq.
Colin B. Vandell, Esq.
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
On behalf of Steve Jobs

I also instructed First Legal Support Services to prepare a Proof of Personal Service.

I also served a true copy of the attached documents entitled **NOTICE OF DEPOSITION OF STEVE JOBS** and **SUBPOENA IN A CIVIL CASE TO STEVE JOBS** by placing same in an addressed sealed envelope clearly labeled to identify the persons being served at the address shown below and placed said envelope for collection with the United States Postal Service located at 9404 Genesee Avenue; La Jolla, California 92037, on March 3, 2008, following ordinary business practices:

Glenn D. Pomerantz, Esq.
Kelly M. Klaus, Esq.
Kimberly D. Encinas, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Attorneys for Defendants

Daniel S. Schecter, Esq.
Colin B. Vandell, Esq.
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
On behalf of Steve Jobs

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on March 3, 2008, at La Jolla, California.


-Sherie Johnson

King &
Ballow

PROOF OF SERVICE

CASE # CV 07-03314 PSG (MANX)

EXHIBIT G

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

KING & BALLOW
LAW OFFICES
LA JOLLA EASTGATE
9404 GENESEE AVENUE, SUITE 340
LA JOLLA, CALIFORNIA 92037-1355

TELEPHONE: 858/597-6000

FACSIMILE: 858/597-6008

www.kingballow.com

March 13, 2008

VIA EMAIL AND FIRST CLASS MAIL

daniel.schecter@lw.com

Daniel Scott Schecter, Esq.
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007

Re: *F.B.T. Prods. LLC v. Aftermath Records* - Case No. CV07-3314 PSG(MANx)

Dear Mr. Schecter:

I write to you in response to your letter of March 10, 2008 pursuant to Northern District of California Local Rule 37-1 regarding our request to depose Steve Jobs, of Apple, Inc. On March 3, 2008, we served a notice of deposition for Mr. Jobs on your law firm. Mr. Jobs' deposition is currently scheduled for March 27, 2008.

Your letter opposes the taking of Mr. Jobs' deposition and states that the deposition is "absolutely precluded as a matter of law." Your letter cites to the case of Thomas v. Int'l Bus. Machs., a Tenth Circuit case dealing with the "apex" deposition. Thomas v. IBM is distinguishable from this matter for several reasons: 1) the Plaintiff in Thomas violated local rules concerning time requirements for noticing a deposition, 2) Akers, the Chairman of IBM's Board of Directors, provided a declaration stating that he did not have any personal knowledge regarding the matters at issue in the case, and 3) the Plaintiff had not made attempts to gather the information using less intrusive means. Thomas is also distinguishable because it refers to the deposition of an officer of a party defendant. In this case, Apple is a third party. Moreover, as you implicitly recognize, there is no Ninth Circuit case law on this issue.

Recent district court cases within the Ninth Circuit have discussed the "apex" deposition rule. In Webside Story v. NetRatings, Inc., the Southern District of California stated that there were two prongs to the "apex" rule: 1) Whether or not the high-level deponent has unique, first hand, non-repetitive knowledge of the facts at issue, and 2) whether the party seeking the deposition has exhausted other less intrusive discovery methods. Webside Story v. NetRatings, Inc., 2007 U.S. Dist. Lexis 20481, (S.D.Cal. 2007).

NASHVILLE OFFICE:

1100 UNION STREET PLAZA • 315 UNION STREET • NASHVILLE, TENNESSEE 37201 • TELEPHONE: 615/259-3456 • FACSIMILE: 615/254-7907

Daniel Scott Schecter, Esq.
March 13, 2008
Page 2

In Celerity, Inc. v. Ultra Clean Holding, Inc., the Northern District of California discussed the "apex" rule in the context of a deposition of a notice of deposition to CEO of Celerity. Celerity, Inc. v. Ultra Clean Holding, Inc., 2007 U.S. Dist. Lexis 8295 (N.D. Cal. 2007). In that case, the court noted that the "apex" rule was not an absolute bar to the deposition of the CEO and stated that Ultra Clean could renew its notice of deposition after less intrusive methods failed to provide the discovery being sought.

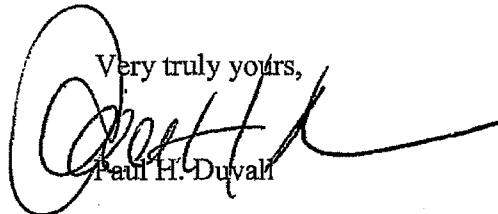
Our request to depose Mr. Jobs is distinguishable from the cases discussed above. In this case, we have given proper notice in compliance with the local rules. Less intrusive methods are not available as Rule 33, Federal Rules of Civil Procedure limits interrogatories to being served only on parties to the litigation. In this matter, Apple is a non-party. Furthermore, we have attempted to use subpoenas *duces tecum* to obtain related documents. As you know from previous meet and confer sessions, you have adamantly refused to either locate and/or produce such documents.

Depositions of lower level Apple employees would not be sufficient. The discovery that we are seeking is based on an essay authored by Mr. Jobs himself in which he discussed his thoughts on the current state of the industry with regards to Digital Rights Management. As a result, Mr. Jobs' knowledge is uniquely personal and not available by deposing a lower-level employee.

You stated in your letter that our deposition notice to Mr. Jobs "smacks of harassment." This is not the case. Typically, the "apex" rule is invoked in cases where one party seeks to depose a high ranking official of the other party who has limited knowledge of the relevant facts, where there is at least an implied improper strategic purpose. Apple is not a party to this litigation. As a result, the deposition subpoena served on Mr. Jobs serves no improper (or even any) strategic purpose. We simply need Mr. Jobs to testify concerning the essay that he personally authored and his statements which are directly relevant and essential to this case.

In an effort to come to a reasonable accord, we would agree to reasonable limitations concerning the length and the location of the depositions. If Mr. Jobs does not appear at his noticed deposition, we will move to compel and seek sanctions. Please contact me to confer regarding this dispute in accordance with the requirements of Local Rule 37-1. I can be reached at (858) 597-6000.

Very truly yours,



Paul H. Duval

PHD:sj

EXHIBIT H

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

Thoughts on Music

Steve Jobs
February 6, 2007

With the stunning global success of Apple's iPod music player and iTunes online music store, some have called for Apple to "open" the digital rights management (DRM) system that Apple uses to protect its music against theft, so that music purchased from iTunes can be played on digital devices purchased from other companies, and protected music purchased from other online music stores can play on iPods. Let's examine the current situation and how we got here, then look at three possible alternatives for the future.

To begin, it is useful to remember that all iPods play music that is free of any DRM and encoded in "open" licensable formats such as MP3 and AAC. iPod users can and do acquire their music from many sources, including CDs they own. Music on CDs can be easily imported into the freely-downloadable iTunes jukebox software which runs on both Macs and Windows PCs, and is automatically encoded into the open AAC or MP3 formats without any DRM. This music can be played on iPods or any other music players that play these open formats.

The rub comes from the music Apple sells on its online iTunes Store. Since Apple does not own or control any music itself, it must license the rights to distribute music from others, primarily the "big four" music companies: Universal, Sony BMG, Warner and EMI. These four companies control the distribution of over 70% of the world's music. When Apple approached these companies to license their music to distribute legally over the Internet, they were extremely cautious and required Apple to protect their music from being illegally copied. The solution was to create a DRM system, which envelopes each song purchased from the iTunes store in special and secret software so that it cannot be played on unauthorized devices.

Apple was able to negotiate landmark usage rights at the time, which include allowing users to play their DRM protected music on up to 5 computers and on an unlimited number of iPods. Obtaining such rights from the music companies was unprecedented at the time, and even today is unmatched by most other digital music services. However, a key provision of our agreements with the music companies is that if our DRM system is compromised and their music becomes playable on unauthorized devices, we have only a small number of weeks to fix the problem or they can withdraw their entire music catalog from our iTunes store.

To prevent illegal copies, DRM systems must allow only authorized devices to play the protected music. If a copy of a DRM protected song is posted on the Internet, it should not be able to play on a downloader's computer or portable music device. To achieve this, a DRM system employs secrets. There is no theory of protecting content other than keeping secrets. In other words, even if one uses the most sophisticated cryptographic locks to protect the actual music, one must still "hide" the keys which unlock the music on the user's computer or portable music player. No one has ever implemented a DRM system that does not depend on such secrets for its operation.

The problem, of course, is that there are many smart people in the world, some with a lot of time on their hands, who love to discover such secrets and publish a way for everyone to get free (and stolen) music. They are often successful in doing just that, so any company trying to protect content using a DRM must frequently update it with new and harder to discover secrets. It is a cat-and-mouse game. Apple's DRM system is called FairPlay. While we have had a few breaches in FairPlay, we have been able to successfully repair them through updating the iTunes store software, the iTunes jukebox software and software in the iPods themselves. So far we have met our commitments to the music companies to protect their music, and we have given users the most liberal usage rights available in the industry for legally downloaded music.

With this background, let's now explore three different alternatives for the future.

The first alternative is to continue on the current course, with each manufacturer competing freely with their own "top to bottom" proprietary systems for selling, playing and protecting music. It is a

very competitive market, with major global companies making large investments to develop new music players and online music stores. Apple, Microsoft and Sony all compete with proprietary systems. Music purchased from Microsoft's Zune store will only play on Zune players; music purchased from Sony's Connect store will only play on Sony's players; and music purchased from Apple's iTunes store will only play on iPods. This is the current state of affairs in the industry, and customers are being well served with a continuing stream of innovative products and a wide variety of choices.

Some have argued that once a consumer purchases a body of music from one of the proprietary music stores, they are forever locked into only using music players from that one company. Or, if they buy a specific player, they are locked into buying music only from that company's music store. Is this true? Let's look at the data for iPods and the iTunes store - they are the industry's most popular products and we have accurate data for them. Through the end of 2006, customers purchased a total of 90 million iPods and 2 billion songs from the iTunes store. On average, that's 22 songs purchased from the iTunes store for each iPod ever sold.

Today's most popular iPod holds 1000 songs, and research tells us that the average iPod is nearly full. This means that only 22 out of 1000 songs, or under 3% of the music on the average iPod, is purchased from the iTunes store and protected with a DRM. The remaining 97% of the music is unprotected and playable on any player that can play the open formats. It's hard to believe that just 3% of the music on the average iPod is enough to lock users into buying only iPods in the future. And since 97% of the music on the average iPod was not purchased from the iTunes store, iPod users are clearly not locked into the iTunes store to acquire their music.

The second alternative is for Apple to license its FairPlay DRM technology to current and future competitors with the goal of achieving interoperability between different company's players and music stores. On the surface, this seems like a good idea since it might offer customers increased choice now and in the future. And Apple might benefit by charging a small licensing fee for its FairPlay DRM. However, when we look a bit deeper, problems begin to emerge. The most serious problem is that licensing a DRM involves disclosing some of its secrets to many people in many companies, and history tells us that inevitably these secrets will leak. The Internet has made such leaks far more damaging, since a single leak can be spread worldwide in less than a minute. Such leaks can rapidly result in software programs available as free downloads on the Internet which will disable the DRM protection so that formerly protected songs can be played on unauthorized players.

An equally serious problem is how to quickly repair the damage caused by such a leak. A successful repair will likely involve enhancing the music store software, the music jukebox software, and the software in the players with new secrets, then transferring this updated software into the tens (or hundreds) of millions of Macs, Windows PCs and players already in use. This must all be done quickly and in a very coordinated way. Such an undertaking is very difficult when just one company controls all of the pieces. It is near impossible if multiple companies control separate pieces of the puzzle, and all of them must quickly act in concert to repair the damage from a leak.

Apple has concluded that if it licenses FairPlay to others, it can no longer guarantee to protect the music it licenses from the big four music companies. Perhaps this same conclusion contributed to Microsoft's recent decision to switch their emphasis from an "open" model of licensing their DRM to others to a "closed" model of offering a proprietary music store, proprietary jukebox software and proprietary players.

The third alternative is to abolish DRMs entirely. Imagine a world where every online store sells DRM-free music encoded in open licensable formats. In such a world, any player can play music purchased from any store, and any store can sell music which is playable on all players. This is clearly the best alternative for consumers, and Apple would embrace it in a heartbeat. If the big four music companies would license Apple their music without the requirement that it be protected with a DRM, we would switch to selling only DRM-free music on our iTunes store. Every iPod ever made will play this DRM-free music.

Why would the big four music companies agree to let Apple and others distribute their music without using DRM systems to protect it? The simplest answer is because DRMs haven't worked, and may

never work, to halt music piracy. Though the big four music companies require that all their music sold online be protected with DRMs, these same music companies continue to sell billions of CDs a year which contain completely unprotected music. That's right! No DRM system was ever developed for the CD, so all the music distributed on CDs can be easily uploaded to the Internet, then (illegally) downloaded and played on any computer or player.

In 2006, under 2 billion DRM-protected songs were sold worldwide by online stores, while over 20 billion songs were sold completely DRM-free and unprotected on CDs by the music companies themselves. The music companies sell the vast majority of their music DRM-free, and show no signs of changing this behavior, since the overwhelming majority of their revenues depend on selling CDs which must play in CD players that support no DRM system.

So if the music companies are selling over 90 percent of their music DRM-free, what benefits do they get from selling the remaining small percentage of their music encumbered with a DRM system? There appear to be none. If anything, the technical expertise and overhead required to create, operate and update a DRM system has limited the number of participants selling DRM protected music. If such requirements were removed, the music industry might experience an influx of new companies willing to invest in innovative new stores and players. This can only be seen as a positive by the music companies.

Much of the concern over DRM systems has arisen in European countries. Perhaps those unhappy with the current situation should redirect their energies towards persuading the music companies to sell their music DRM-free. For Europeans, two and a half of the big four music companies are located right in their backyard. The largest, Universal, is 100% owned by Vivendi, a French company. EMI is a British company, and Sony BMG is 50% owned by Bertelsmann, a German company. Convincing them to license their music to Apple and others DRM-free will create a truly interoperable music marketplace. Apple will embrace this wholeheartedly.

EXHIBIT I

TO THE DECLARATION OF COLIN B. VANDELL IN SUPPORT OF NON-PARTY STEVE
JOBS'S OBJECTION TO ORDER DENYING MR. JOBS'S MOTION FOR PROTECTIVE
ORDER TO QUASH "APEX" DEPOSITION SUBPOENA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

F.B.T. Productions, LLC, et al.,

Plaintiffs,

v.

AFTERMATH RECORDS, et al.,

Defendants.

Case No.: C 08-80040 RMW (PVT)

**ORDER DENYING NON-PARTY
STEVE JOBS' MOTION TO QUASH
SUBPOENA**

On April 29, 2008, the parties and non-party Steve Jobs ("Jobs") appeared before Magistrate Judge Patricia V. Trumbull for hearing on Jobs' motion to quash.¹ Based on the briefs and arguments submitted,

IT IS HEREBY ORDERED that Jobs' motion to quash is DENIED, however in light of the narrow subject matter of the deposition sought, the court finds it appropriate to limit the duration of the deposition to two hours.

Jobs has not shown that appearing for deposition would impose an undue burden on him that would warrant quashing the subpoena entirely. "A strong showing is required before a party will be denied entirely the right to take a deposition." *See Blankenship v. Hearst Corp.*, 519 F.2d 418, 429

¹ The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

1 (9th Cir. 1975) (district court erred in granting protective order ordering plaintiff not to depose
2 Herald-Examiner's publisher when plaintiff suggested possible information publisher might have
3 that others did not). Here, although one of Apple's in-house counsel has submitted a declaration²
4 containing conclusory assertions about Jobs having a "busy" schedule, there is no declaration that
5 states *specific facts* from which the court could conclude that it would be unduly burdensome for
6 Jobs to appear for a short deposition.³ Absent at least *some* actual showing of undue burden, there is
7 no legal authority for requiring Defendants to use purportedly less burdensome means of obtaining
8 the discovery before allowing "apex" depositions. See FED.R.CIV.PRO. 26(c) (authorizing protection
9 from *undue* burden "for good cause shown").

10 Protection from "apex" depositions is particularly inappropriate where, as here, it appears
11 that the deponent may have first-hand knowledge of a relevant fact.⁴ Plaintiffs assert, and Jobs does
12 not deny, that Jobs himself executed the original agreement between Apple and Defendant UMG
13 Recordings, Inc. (the "iTunes Agreement"). The nature of the iTunes Agreement is relevant to the
14 present litigation, because the contract at issue in this litigation provides for different royalty rates
15 depending on whether the recordings covered by the contract are sold or licensed. Contrary to Jobs'
16 argument, there *are* situations in which a contracting party's subjective understanding may be

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18 ² Plaintiffs objected to Paragraph 17 of Saul's declaration on the grounds that it is not
19 based on Saul's personal knowledge, and that, to the extent it is based on statements by others, it is
20 hearsay. Jobs responded that the passage is based on Saul's own observation of the essay itself and its
21 placement on the public iTunes website. The court sustains Plaintiffs' objections, and strikes Paragraph
22 17 from the declaration. This court's Local Rule 7-5(b) prohibits inclusion of conclusions or argument
23 in declarations, and provides that such declarations may be stricken in whole or in part. Saul's assertions
24 are not factual evidence, they are merely conclusions and argument based on speculation about Jobs'
25 "intent" in writing the article (only Jobs has personal knowledge of his intent).

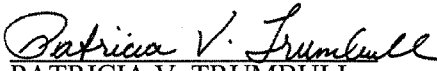
26 ³ Jobs himself did not submit any declaration setting forth any facts that demonstrate that
27 appearing for a short deposition would unduly interfere with his ability to fulfill his work obligations.

28 ⁴ Because of the potential for abuse, courts do sometimes protect high-level corporate
officers from depositions when the officer has no first-hand knowledge of relevant facts or where the
testimony would be repetitive. See *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979). However, where
a corporate officer may have *any* first hand knowledge of relevant facts, the deposition should be
allowed. See *Blankenship*, 519 F.2d at 429; see also, *Anderson v. Air West, Inc.*, 542 F.2d 1090,
1092-93 (9th Cir. 1976) (approving denial of Howard Hughes' motion for protective order because he
"probably had some knowledge" regarding the substance of the plaintiffs' claims). Further, a claimed
lack of knowledge or recollection does not provide sufficient grounds for a protective order, because the
opposing party is entitled to test that lack of knowledge or recollection. See *Amherst Leasing Corp. v.*
Emhart Corp., 65 F.R.D. 121, 122 (D. Conn. 1974); and *Travelers Rental Co., Inc.*, 116 F.R.D. 140, 143
(D. Mass. 1987).

1 relevant to the interpretation of a contract. *See, e.g.*, CAL.CIV.CODE, § 1649 (“If the terms of a
2 promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the
3 promisor believed, at the time of making it, that the promisee understood it.”)

4 Jobs’ *Thoughts on Music* essay provides at least some reason to believe that Jobs understood
5 the nature of iTunes Agreement to be a license rather than a sale. Under all the circumstances, the
6 court finds it appropriate to allow the deposition, but to limit it to two hours. *See* FED.R.CIV.PRO.
7 26(b)(2)(c)(iii).

8 Dated: 5/1/08

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10 PATRICIA V. TRUMBULL
11 United States Magistrate Judge
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